S. HRG. 101-427

# MUST CARRY

## HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

CABLE CARRIAGE OF LOCAL BROADXCAST SIGNALS

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OCTOBER 25, 1989

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# MUST CARRY

WEDNESDAY, OCTOBER 25, 1989

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 9:05 a.m., in room 253, Russell Senate Office Building, Hon. Daniel K. Inouye (chairman of the subcommittee) presiding.

Staff members assigned to this hearing: Toni Cook and Tom Cohen, staff counsels; and Gina Keeney, minority staff counsel.

## OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. The Communications Subcommittee will receive testimony this morning relating to the so-called "must-carry" rules, which require cable television systems to carry the signals of local TV stations.

This is not a new issue to this Subcommittee. Some seven years ago we almost passed legislation on this matter and we have held many hearings since then where this issue has been raised.

The "must-carry" rules were originated by the FCC some 25 years ago. They served to ensure that the American public would have access to the important services provided by local TV broadcasters.

These rules would still be in effect today, were it not for two decisions by the U.S. Court of Appeals in the Quincy and Century cases, finding that the rules infringed upon the First Amendment rights of cable operators.

While the Court found the existing rules unconstitutional, it explicitly stated that "must-carry" rules are not, per se, unconstitutional. Congress can then resurrect some form of "must-carry" rules, but because of these decisions we must do so carefully, keeping in mind the Court's holdings.

We first must develop "must-carry" rules that reflect the current media marketplace and serve the best interests of the American public. Second, we must ensure that these rules can pass the constitutional muster.

We all recognize the difficulties in both tasks, but I believe we can succeed. Because of the efforts of the various industries concerned with the "must-carry" issue, we are now well on our way toward developing the policies and evidence required to codify the rules.

In fact, with efforts made at the behest of our House colleagues this past summer, we are very close to our goal, and what is required now is a concerted effort to bring this matter to a close.

After speaking to many members of the Subcommittee I believe there is great support for the codification of the rules. Moreover, the members would like to achieve this objective in the near future and so it is my strong desire to complete action on this measure before Congress goes on recess later this year.

So I urge the interested parties, who I understand will meet shortly, to reach an agreement promptly. The members can then review this in short order to ensure that it meets with our public interest objectives.

We are fortunate to have legislation just reported from the Committee, the Children's TV Act, which I also hope to move this year. This Children's TV bill would be an obvious and appropriate vehicle for the "must-carry" legislation, and so if we all work together I believe we can make "must-carry" legislation a reality by the end of this year.

We will hear this morning from various parties involved in the "must-carry" debate, and I welcome them to the Subcommittee and look forward to hearing their testimony, but before we do, Senator McCain, do you have a statement?

## OPENING STATEMENT BY SENATOR McCAIN

Senator McCAIN. Thank you, Mr. Chairman. I would like to say I agree with your comments and I hope we can move forward on this issue as quickly as possible.

As you pointed out, on two different occasions "must-carry" rules have been struck down by the courts, and it seems to me that our goal should be to shape some kind of legislation which is permanent in nature.

I think the situation is made more urgent as cable operators become more and more vertically integrated and competition between broadcasters and cable operators for viewers and advertising is getting more and more fierce, and obviously our overriding concern and role is to ensure that this competition remains fair and that the consumer continues to enjoy maximum diversity.

I am looking forward to the testimony of some very highly qualified witnesses today, which I believe will be very valuable in helping us make some kind of final adjudication of this issue.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you, sir. Senator Gore?

## OPENING STATEMENT BY SENATOR GORE

Senator GORE. Thank you, Mr. Chairman. The "must-carry" rules are an important issue for this Committee and for the broadcasters and cable operators who will have to live by them if we codify some standard, and so I want to thank you for moving expeditiously with this hearing.

It has become obvious to many of us that since the 1984 act, the cable industry has changed in ways that were not anticipated at the time that act passed, and the continuing threat reported to us from time to time by cable to toss independent broadcasters, and

even public broadcasters, off the cable, is just one manifestation of some of the problems that have appeared.

While there are only limited reports of public broadcasters being totally dropped from cable systems, the threat remains, and I am not exactly comfortable with allowing that great guardian of the public interest, TCI, to manage the fate of public broadcasting and the broadcast media diversity in general.

The able technological monopoly is real. It is not theoretical. It is not merely a potential problem. There are millions of families who have become essentially captive to cable in order to get a clear television signal, and as cable moves to consolidate and dominate the marketplace, more and more programming choices will be determined in corporate cable centers in Denver and New York.

There are other reasons for concern—cable's exploitation of its vertical integration with programming interests—and there has been recently a special manifestation of the problem of the technological bottleneck in Charleston, South Carolina, where the cable is still down.

So I believe today's hearing is extremely important. I expect it will create a clear record for codification of the "must-carry" rules, and I believe that such legislation ought to be designed to simply allow cable to carry as many signals as is in the public interest. The legislation should reflect the public interest in general and take into account the rapidly growing technological monopoly that cable is asserting over the entire country.

Mr. Chairman, I also want to thank you for the hearings that will be upcoming soon on other cable issues and I hope and expect they will set the stage for legislative action on cable and satellite television bills which I and many of our colleagues have introduced during this session.

Thank you.

Senator INOUYE. I thank you very much. Senator Pressler?

## OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Mr. Chairman, I will place most of my statement in the record.

I want to thank you for calling today's hearing. I have consistently supported the "must-carry" rules, and I am a co-sponsor of S. 177, which would reinstate those rules by tying "must carry" to the compulsory license that cable operators must currently have.

That bill has been referred to the Judiciary Committee, and so we are not considering that legislation today. Nonetheless, I am pleased that the Chairman has called this hearing on an issue of interest to many on this Committee. I am also pleased that the cable industry does not oppose codification of "must carry" as such.

I hope that we will hear some ideas in this hearing that can lead to good "must-carry" legislation that will both withstand constitutional scrutiny and serve the public interest. The subquestion of channel positioning is one of great disagreement, and I look forward to the witnesses' testimony on that issue.

The subquestion of channel positioning is one of great disagreement, and I look forward to the witnesses' testimony on that issue.

Thank you again, Mr. Chairman, for holding this hearing and for scheduling hearings in November to review other cable issues.

Senator INOUYE. I have opening statements from Senators Hollings and Burns and I will include in the record.

[The statements follow:]

OPENING STATEMENT BY THE CHAIRMAN

I am pleased that we are here today to consider reinstitution of rules requiring cable television systems to carry a reasonable number of local television signals, particularly the signals of public broadcasters and independent operators. It is very important that the public have access to news and information provided by local broadcast signals.

My local broadcasters played a very important role in disseminating safety information to the residents of South Carolina before and after Hurricane Hugo came ashore. Broadcast stations also proved to be a vital source of information to the residents of Northern California after the recent earthquake. But, we all know that we depend greatly on broadcast television day in and day out. Citizens regularly rely on their local broadcast stations to keep them informed about issues of importance to their local community, such as candidates' positions on issues in local elections, local news, and public affairs issues.

For these reasons, I believe that it is imperative that we fashion must carry legislation to ensure that citizens have access to a variety of local broadcast stations and that those rules be fashioned to withstand court challenge. The Committee is looking to the industry to help us achieve those goals.

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OPENING STATEMENT BY SENATOR BURNS

Mr. Chairman, thank you for scheduling today's hearing. I greatly appreciate your leadership on this very important public policy issue.

The competitive relationship between broadcast television stations and cable television systems and its effect on the public interest is of paramount importance. One of the most important aspects of that broadcast-cable interface is the ability of cable subscribers to access broadcast stations that are available over-the-air in their local areas. In the past, the Federal Communications Commission (FCC) addressed this concern through "must carry" rules, that is, regulations governing which television broadcast signals cable television operators must carry on their systems.

The Century and Quincy courts created a formidable legal and constitutional test for any future attempt to craft new must carry rules. First, to establish the requisite substantial government interest, the Congress will need to produce evidence that, absent must carry rules, cable would drop broadcast stations on a widespread, nationwide basis, thereby posing a threat to viewers access to them. Second, the must carry remedy must be sufficiently narrowly tailored to counter that threat. Finally, the court still reserved the possibility that must carry is content-based regulation of speech that must pass the very strict standard of Tornillo rather than the mere substantial government interest test required in O'Brien. While this is admittedly a stiff requirement to meet, the court made clear that "we do not suggest that must carry rules are per se unconstitutional."

In addition to the legal and constitutional questions, there are a number of important policy issues. First, it is clear that the cable industry has evolved from a mere supplemental and passive provider and retransmitter of off-the-air broadcast programming to a source of a multiplicity of original and existing video services and, thus, has become a direct competitor with the broadcast industry. In this new environment where cable is both a competitor with and conduit for broadcast television, I believe some form of regulation is necessary to (1) maximize program choices for the public and (2) promote a fair and open competitive environment between cable and broadcasting that will result in programming that will meet the public's interests, needs and preferences. Program choices are maximized when cable subscribers have access to broadcast stations. Must carry rules may be necessary, at least on an interim basis, to preserve the ability of broadcast stations to compete for the attention of cable subscribers. This is particularly important for public television stations and newly authorized stations.

In determining the appropriate course of action for the Congress, we must examine all options. These options include (1) adoption of must carry rules based on an industry compromise, if one can be reached or, in the alternative, must carry obligations of the kind agreed to in the 1986 industry compromise; (2) adoption of must

carry rules similar to those last adopted by the FCC, including A/B switch, consumer education and sunset provisions; (3) conditioning retention of cable's compulsory license on compliance with must carry obligations; or (4) conditioning the 1984 Cable Act's deregulation of rates and services on compliance with must carry obligations. This, of course, is not an exhaustive list.

As part of our must carry analysis we must also consider the related issue of channel positioning. Most importantly, we must decide whether it is justifiable, from both a constitutional and public policy perspective, for broadcasters with a high numbered UHF assigned channel number to have a permanent right to continue to occupy a low numbered, VHF slot on the cable system.

These issues involving access to broadcast signals by cable subscribers are made more difficult by the lack of empirical evidence. The significance of these difficulties is manifested most plainly in the Century and Quincy decisions. In light of these rulings, it is clear that more extensive impirical data and analyses describing patterns of cable system signal carriage practices and any adverse impact such practices may have on the broadcast industry and the public are needed to support the development and implementation of policy in this area.

Accordingly, I look forward to hearing from our distinguished witnesses and reviewing the empirical data and analyses gathered as part of the hearing record. I hope this data will permit the Congress to definitively resolve the must carry and channel positioning issues with constant reference to the goals of (1) maximizing programming choices for the viewing public and (2) promoting a fair and open competitive environment between cable and broadcasting that will produce programming that meets the public's interest, needs and preferences.

Again, Mr. Chairman, I appreciate your leadership on this issue. I look forward to working with you on resolving this issue.

Senator INOUYE. This morning, we have an array of most impressive witnesses. We have divided these witnesses into two panels. Our first panel consists of the President of the National Cable Television Association, Mr. James P. Mooney, the President of the National Association of Broadcasters, Mr. Edward O. Fritts, the President of the Community Antenna Television Association, Mr. Stephen R. Effros, the President of the Association of Independent TV Stations, Incorporated, Mr. Preston Padden, and the President of the National Association of Public Television States, Mr. David Brugger.

Gentlemen, I thank you for your presence this morning and we look forward to receiving your testimony. May I first call upon the President of the National Cable Television Association, Mr. Mooney?

## STATEMENT OF JAMES P. MOONEY, PRESIDENT, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. MOONEY. Thank you, Mr. Chairman.

Mr. Chairman, we have submitted an extensive statement, which, with your permission, I will just summarize.

Senator INOUYE. All of your statements have been received and they will be made part of the record in total, sir.

Mr. MOONEY. Thank you, sir.

The recent history of the must-carry issue is a history of attempts to find a lasting compromise that can stand up in the face of the First Amendment.

I recall, nearly three years ago, after the court of appeals struck down the FCC's original must-carry rule, of going to the NAB winter board to offer an olive branch to the broadcasters on must carry. And within a month of that meeting we were able to reach a joint industry compromise we could recommend to the FCC.

After a very difficult process, the FCC did come through with a new rule, which generally followed the lines of the joint industry compromise, except that it improved it somewhat for public stations and new stations. These changes had not been part of the original deal, but in the interest of conciliation, we stayed aboard the deal as modified.

Unhappily, that rule, too, was struck down by the court of appeals as unsupported by the FCC's record. And today we are again in a situation of the issue being unresolved.

I would make just a few points. First, almost all local broadcast signals continue to be carried by their local cable systems. There has not been any broad scale disruption of signal carriage in any region of the country. And the small flurry of channel shifting, which characterized the immediate aftermath of the second court decision, has died down, too. Things are pretty quiet out there.

Second, however, because we understand that the absence of must carry is a continuing source of anxiety for broadcasters, we are willing to see the rule put back into effect, including the modifications the FCC made for the benefit of public broadcast stations and news stations.

Third, as is informally, but nonetheless, well known, we are even willing to agree that the deal should be further improved for the broadcasters in a variety of respects. In discussions I have had with Mr. Fritts, cable has agreed to address the so-called leapfrogging problem involving carriage of the closest network affiliate station.

We have agreed to require cable operators to give advance notice to local broadcasters before changing the location of the broadcasters signal on the cable system. We are willing to agree to absolutely forbid channel shifts during the broadcasters sweeps rating periods. And we have agreed to phase out entirely the exemption for small cable systems.

None of these things were included in the original compromise, and each of these concessions go further in the broadcaster's direction.

Most important, we have offered also to agree that as a solution to the so-called channel shifting issue, that the broadcaster should be legally entitled to a channel number on a cable system identical to the channel number given him by the FCC for his over-the-air broadcasts.

And I might add that the Nielsen Corporation, which is probably the best source of data on this, tells us that you can do that at least two-thirds of the time.

But there, still, on the channel positioning issue, is the rub. Some of the high-numbered UHF broadcasters who got a low number on a cable system, in the days when most cable systems had only 12 channels, insist that they should have a right, perpetually, to occupy that low-numbered slot.

This is a claim which is commercially based. They think they will get more viewers and, therefore, ad dollars if they can stay in that low-numbered slot.

Now, in our view, we think they are overreaching. I think they have a hard time justifying a legal claim to a cable slot better than the one the FCC gave them off air.

Moreover, the cable networks take umbrage at the idea that local broadcast signals not only ought to be entitled to carriage, while cable networks are not, but that the broadcasters also ought to get preferential channel assignments as a matter of law.

In any event, that is where this thing is hung up. And despite the best efforts of Mr. Fritts and myself, we have not yet been able to unravel the knot.

I do think this needs to be worked out, though. And as to the channel positioning issue, there really ought to be some neutral principle which can be imposed without telling the cable networks that they are not just second-class citizens, but third-class citizens.

We also think there ought to be some reasonable limit to the indies' willingness to hold up an overall solution in order to extract from us additional concessions, which they cannot objectively justify. But we will leave it to this committee to be the judge of that.

Mr. Chairman, we appreciate your having this hearing. We think it is a subject which needs to be aired, and we appreciate the opportunity to participate.

[The statement follows:]

**STATEMENT OF**

**JAMES P. MOONEY**

**PRESIDENT AND CHIEF EXECUTIVE OFFICER**

**NATIONAL CABLE TELEVISION ASSOCIATION**

Mr. Chairman, members of the Subcommittee my name is James P. Mooney. I am President and Chief Executive Officer of the National Cable Television Association. NCTA represents approximately 2,700 cable television systems, serving more than 80% of the 50 million cable households in the United States, and 56 cable programming networks engaged in creating and packaging a great diversity of cable programming.

NCTA appreciates the opportunity to appear before you today to discuss carriage of local broadcast stations by cable television systems.

Let me begin by stating that NCTA supports Congressional enactment of a constitutionally sound must carry law. We believe cable system carriage of local broadcast stations benefits those stations, benefits the cable operators, and -- most important -- benefits the public.

In order to assess the current status of broadcast carriage on cable systems, and the issues this Committee is now considering regarding a must carry statute, it may be helpful first to review the events that led us to this point.

When the Federal Communications Commission first promulgated its must carry rules almost 25 years ago, cable television was a technology unknown to most of America. It existed primarily in rural areas as a community antenna television service that picked up broadcast signals in areas where it was difficult to receive them over home antennas, and retransmitted those signals over coaxial cable into customers' homes. In other words, when must carry was first established, cable television sold little if

anything more than a clear picture. The FCC, which had no explicit jurisdiction over cable television, was allowed to require these community antenna television services to retransmit all local broadcast stations under the legal theory that such regulations were permissible because they were "reasonably ancillary" to the Commission's mandate to regulate broadcast television.

Since that time, of course, cable has evolved from a retransmission service to one which provides its own programming to consumers, in vigorous competition with programming provided by local broadcasters.

Cable is no longer ancillary to broadcasting, but is a means of television delivery of stature equal to broadcasters. This parity exists in the marketplace and exists in the law. It was the cornerstone upon which the Cable Communications Policy Act of 1984 was built. It has been recognized twice by the U.S. Court of Appeals for the District of Columbia Circuit, which has invalidated two different sets of must carry regulations because they have the effect of preferring one class speakers (broadcasters) over another (cable networks). The court has twice found that effect violates the First Amendment rights of cable networks, violates the First Amendment rights of cable operators, and violates the First Amendment rights of cable customers.

I would like to review briefly the history of these two sets of must carry regulations and of the court decisions which invalidated them. If Congress is to enact a constitutionally sound must carry law, it must avoid the First Amendment shoals upon which the FCC's regulations twice have foundered.

## I. A Brief History of Must Carry

Beginning in 1965, the FCC had in effect a complex collection of regulations that required cable systems to give priority, free carriage to all local broadcast signals before providing cable consumers with any other programming service. Two challenges to these must carry rules, however, led to the invalidation of the rules in 1985. The Commission would replace these rules with more flexible, interim regulations in 1986; but these rules, too, were invalidated by the court.

### A. The Quincy Decision

The first challenge to the 1965 must carry rules arose from a situation in Quincy, Washington, a small town located about halfway between Seattle and Spokane, and about 125 miles away from either city. The cable system in Quincy carried the three broadcast network affiliates from Seattle, and the largely duplicative affiliates of the same networks from Spokane. After conducting customer surveys, the cable system, which at the time was a 12 channel system with all 12 channels in use, found that its subscribers wanted to drop the Spokane affiliates and replace them with cable network programming, including Cable News Network. After first trying unsuccessfully to obtain a waiver from the FCC, the system eventually took action to meet its subscribers' demands. The Commission then found the system was in violation of the must carry rules and the system was fined.

The cable system appealed this FCC action to the U.S. Court of Appeals for the D.C. Circuit, alleging violations of First and Fifth Amendment rights.

At about the same time, another case arose from a petition for rulemaking filed by Turner Broadcasting, which asked the FCC to eliminate its must carry rules. Turner documented that the FCC rules were working to keep its services, Cable News Network and Headline News, from getting on cable because the channels were taken up for broadcast signals. Turner believed this to be a constitutionally impermissible situation that preferred one class of speakers -- broadcasters -- over another -- cable programmers, such as Turner.

The two cases were consolidated on appeal. On July 19, 1985, the D.C. Circuit Court of Appeals agreed with the appellants and struck down the FCC's 20-year old must carry regime.[1] In doing so the court found, among other things:

(1) The must carry rules violated the First Amendment rights of cable programmers. The court noted:

> "Their (the must carry rules) very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers. Under the protective aegis of the rules, local

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1/ Quincy Cable TV v. FCC, 768 F.2d 1434 (D.C. Cir. 1985).

broadcasters are guaranteed the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels."[2]

After recalling their decision in a case brought a year earlier by the National Association of Broadcasters, that "existing licensees have no entitlement that permits them to deflect competitive pressure from innovative and effective technology,"[3] the court heeded the admonition of the U.S. Supreme Court that "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . ."[4]

(2) The must carry rules violated the First Amendment rights of cable operators. The court noted that "the rules coerce speech" and found that the injury produced by the rules "stems from the substantial limitations the rules work on the operators' otherwise broad discretion to select the programming it offers to subscribers."[5] The court found

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2/ Ibid., at 1451.

3/ National Association of Broadcasters v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

4/ Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

5/ Quincy Cable TV v. FCC, supra, at 1452.

the must carry rules to be a constitutionally impermissible intrusion into cable operators' editorial autonomy and discretion.

(3) The must carry rules violated the First Amendment rights of cable subscribers. In denying the Turner petition, the FCC itself admitted that the rules "compel carriage of broadcast signals in place of alternative programming its subscribers, if given a choice, might otherwise choose." The court took a dim view of this approach. It noted:

> "Indeed, as a matter of established regulatory policy, the Commission considers the desires of cable subscribers to be irrelevant to the application of the rules. This conscious disregard of the subscribers' viewing preferences is difficult, if not impossible, to reconcile with the Supreme Court's repeated admonition that the interests of viewers should be considered 'paramount' in the First Amendment calculus. While, of course, viewers of broadcast television have significant First Amendment interests, we doubt very much that cable subscribers can be left out of the equation entirely."[6]

(4) The must carry rules could not be sustained in the name of preserving "localism" in broadcasting. The court found the rules too inclusive to further the governmental interest because the rules guaranteed carriage to all broadcast stations, regardless of the amount of local programming they actually created and aired.

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6/ Ibid., at 1453-1454.

> "[I]f the goal is to preserve 'localism' and not 'local broadcasters,' the must-carry rules are 'grossly' overinclusive....The 18th station is entitled to carriage no less than the first even if its programming is virtually duplicative of the viewing fare already transmitted over the cable system....It is not the fact of the 18th station that is troubling, but the fact that it is guaranteed a channel even if carriage effectively bumps a cable programmer, regardless of the extent it impinges on the cable operator's editorial autonomy, and irrespective of whether it thwarts viewer preferences. Given the substantial First Amendment costs implicit in this sweeping guarantee, the Commission must make some effort to move beyond the amorphous in defining the interest served by the must-carry rules. Until it establishes a baseline for its general objective of preserving free, community-oriented television -- measured by the number of local broadcast stations in the community, the amount of local programming, or any other criterion within its discretion to choose -- we simply cannot know whether the rules are adequately tailored to pass constitutional muster."[7]

(5) Without empirical evidence of demonstrable harm to broadcasters resulting from lack of carriage, must carry rules cannot pass First Amendment scrutiny. Throughout the entire opinion, the court criticized the FCC for adopting constitutionally intrusive regulations based solely on conjecture and "intuition" rather than on empirical evidence demonstrating need.

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7/ Ibid., at 1460-1461.

The court went to great pains to point out that it did not find the concept of mandatory carriage so completely hostile to the First Amendment that regulations could not be written which would pass scrutiny under the First Amendment. It did not provide the FCC with substantial guidance, however, on how such rules could be crafted in a manner consistent with the First Amendment.

B. The Post-Quincy Compromise Between Cable and Broadcasters

After the Quincy decision, the cable industry took an unprecedented step. Mindful of our public interest responsibilities, of our customers' preferences, and of the political imperatives of Congress, NCTA entered into negotiations with the National Association of Broadcasters, the Television Operators Caucus, and the Association of Independent Television Stations (INTV). These negotiations produced a compromise in 1986 in which NCTA agreed to ask the FCC to reimpose specific mandatory signal carriage rules. A copy of the agreement between these trade associations, along with an attendant letter of political understandings that was an integral part of the deal, is attached to this testimony. I request that it, too, be printed in the record of these hearings.

Mr. Chairman, I know of no other instance in which courts have freed a particular industry from regulation on constitutional grounds, and that industry has then voluntarily agreed to forego that market freedom and submit to re-regulation. With due deference to my friends in Washington who head these trade associations, I dare suggest that had the Court of Appeals ruled

the other way, and found the old must carry rules consistent with the First Amendment, the broadcast community at large would have been no more willing to enter into negotiations to reform those rules to accommodate cable than they were prior to the Quincy decision.

After the compromise was reached, NCTA, NAB, the TOC, and INTV petitioned the Commission to promulgate new mandatory carriage rules based on the agreement of these organizations. The agreement was basically a scaled-down version of the former rules that provided for mandatory carriage of local signals, but which also recognized the First Amendment prerogatives of cable operators and provided them with some editorial discretion over their channels.

Although the specifics of the deal were relatively complicated, in essence, they provided that any television station within 50 miles of the cable system that could demonstrate a threshold market share would qualify for free, mandatory carriage, although the agreement established a ceiling on the number of qualified stations that a cable operator could be required to carry. Specifically, cable systems with more than 20 but fewer than 27 channels could not be required to carry more than seven qualified stations, and systems with more than 27 channels could not be required to devote more than 25 percent of their channels to carrying qualified stations. (Systems with 20 or fewer channels were exempt from any mandatory carriage requirements.) In cases where the number of qualified signals exceeded the maximum number that a cable operator was required to carry, the operator was free to choose the ones to be carried and to enter independent arrangements with the others.

C. Channel Positioning and the Post-Quincy Compromise

One of the issues specifically addressed at the bargaining table by NCTA, NAB, INTV, and the TOC dealt with operator discretion over channel designation of qualified broadcast signals carried under the proposed agreement. Since some independent broadcasters continue to raise this matter, I want to provide some background.

Throughout the 20-year history of the FCC must carry rules, local broadcast stations were required to be carried as a part of "basic service" provided to all cable subscribers. The Commission's rules generally required cable operators, on request, to carry a VHF signal on the cable channel with the same number as its broadcast channel; that is, on the number between 2 and 13 assigned to that station by the FCC for its broadcast frequency. For technical reasons, the rules generally did not require "on channel" carriage of UHF stations and allowed cable operators to place UHF stations anywhere within the basic service package.

Because channel positioning was a matter covered by the old must carry rules, it was again addressed by the industry organizations in reaching their 1986 recommendation for new must carry rules. The issue was covered in item 11 of the letter, dated February 26, 1986, and signed by Edward O. Fritts, Margita E. White, and Preston Padden, spelling out the inter-industry compromise. This item, which is one of a group of twelve points that reflected everyone's understanding of the compromise, states "Systems are not required to carry stations on their channel positions, but must carry all qualified local stations in their entirety on the lowest priced tier." Thus, the joint industry

petition asked the FCC for a new must carry rule which not only allowed continued flexibility as to channel designation for UHF stations, but also agreed to repeal all on channel requirements for VHF stations. As I noted earlier, a copy of this letter is appended to this statement.

It long has been an article of faith in the broadcasting industry that a UHF license is effectively converted into a VHF license by cable carriage, because the cable retransmission improves and extends the relatively weak UHF signal beyond its normal limitations and because carriage on cable channels 2 through 13 removes the need, inherent in off-air reception of UHFs, for consumers to switch their TV sets to the UHF band. In addition, UHF broadcasters like being carried on low-numbered cable channels because they feel such positioning gives them a competitive advantage over cable programming networks.

One hears a lot of talk these days about the necessity to be carried on numbers 2 through 13; anything higher has been called "cable Siberia" by broadcasters seeking not only free carriage, but control of the cable operators' marketing plans and program packages. As one hears this talk, it is important to keep in mind, as I noted earlier, that UHF broadcasters never had a rule through which they could force channel designation, and that the NAB, TOC, INTV and NCTA agreed as a part of their 1986 must carry compromise that the matter would remain within cable operators' discretion. It is also important to keep in mind that "cable Siberia" -- those

high numbered channels UHF broadcasters deem unacceptable for cable carriage -- do not come from whole cloth. They are, in fact, the same high numbered channels for which those UHF broadcasters have sought and obtained a federal license to broadcast over the air.

I discuss our views regarding the issue of channel positioning later in this statement.

D. The FCC's Second Must-Carry Rules

In 1986, after a long and difficult series of proceedings, the FCC largely accepted the inter-industry compromise, but made four major revisions.

First, special rules were added for public broadcast stations that, in effect, gave such stations preferential treatment over commercial stations. Specifically, local public broadcast stations would qualify for mandatory carriage without being required to demonstrate the threshold market share required of other stations. Moreover, as a general matter, operators with more than 20 but fewer than 54 available channels would be required to include at least one local public broadcast station and systems with 54 or more channels would be required to include at least two such stations.

Second, new commercial stations were exempted for one year from the requirement of demonstrating audience share. In other words, such stations were given preferential treatment compared to established commercial stations.

Third, the Commission, sua sponte, required cable operators to offer subscribers an input selection device (an A/B switch) that would allow consumers to flip freely between television reception by cable and over the air broadcast signals. Cable operators were also to conduct an educational campaign to inform consumers of the uses of the input selection device.

Fourth, the Commission sunset all regulation but the A/B switch educational requirement after five years.

E. The Century Decision

These new rules were challenged in the D.C. Circuit Court of Appeals by Century Communications, a cable operator with deeply-held convictions about the First Amendment.[8] Century alleged that these new rules, like the old ones, violated their First Amendment rights. In December 1987, the D.C. Circuit Court of Appeals again struck down the must carry rules, finding the record inadequate to justify the new rules in light of the First Amendment rights of cable operators, programmers, and subscribers.

The court found that the FCC had not demonstrated, either logically or by record, the substantial governmental interests necessary to justify intrusion into cable's First Amendment rights. In the Quincy decision, the court had criticized the FCC repeatedly

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8/ Century Communications, however, is not a member of NCTA.

for its lack of empirical evidence that could be used to argue in favor of perpetuating must carry rules. Once again, with the revised rules, the court found that the Commission lacked empirical data sufficient to sustain the rules.

The court found that a NAB study cited by the Commission, submitted to defend the five year duration of the rules, contained a "melange of disparate facts and findings," and that accepting them "requires an inferential leap of some distance to arrive at a need for five more years of must carry."[9]

The Commission had argued that the five year transitional period was necessary for consumers to adjust (or more accurately readjust) to a world where a television broadcast antenna is necessary. But the court said:

> "We simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes. In a culture in which even costly items like the videocassette recorder, the cordless telephone, and the home computer have spread like wildfire, it begs incredulity to simply assume that consumers are so unresponsive that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows."[10]

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9/ Century Communications v. FCC, 834 F.2d 292, 302 (D.C. Cir. 1987).

10/ Ibid., at 302.

The court seemed more persuaded by the NAB study's observation that about half of the survey's respondents were unwilling to predict that they would ultimately purchase what the survey question termed a "special switch." The court believed this "almost certainly reflects merely the present consumer unfamiliarity with the switch and antenna mechanism. To the extent that it does not, it may also reflect consumer disinterest in having access to off-the-air signals."[11]

Finally, the court found it crucial that "the Commission relies heavily on its assumption that in the absence of must carry rules, cable companies would drop local broadcasts. . . During the 16 months that elapsed between Quincy Cable TV and the reimposition of modified must carry rules, cable companies generally did not drop the local broadcast signals that they had been carrying prior to Quincy Cable TV."[12]

Although NCTA filed comments supporting the compromise at the FCC, it was not obliged by the joint industry agreement to defend the constitutionality of the rules and did not attempt to do so, either in its comments to the FCC or in the court proceeding, leaving such efforts to the broadcast industry.

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11/ Ibid., at 302.

12/ Ibid., at 303.

Accordingly, NCTA did not participate in the Century case other than to urge the court not to stay the new ruling pending the appeal.

In the meantime, the court has clarified its decision to state it only struck down the mandatory carriage requirements of the rules. The A/B switch provisions remain and, indeed, become effective November 1, 1989.

## II. July 1989: The Cable-Broadcast Compromise Rejected By INTV

Since the Century decision, the cable industry has remained open and willing to join with broadcasters in seeking a legislative solution to the must carry issue. Eddie Fritts, President of NAB, has been quite diligent and cooperative in working toward our shared goal.

Last July, Mr. Fritts, as the head of the principal trade association for both network and independent broadcasters, approached NCTA to discuss the possibility of whether we could reach a compromise agreement on must carry and jointly urge its inclusion in the Reconciliation package then under consideration by the House Committee on Energy and Commerce. NAB had learned of some interest among Committee members in resolving the issue at that time.

Mr. Fritts and I were able to reach a tentative agreement in principle on a compromise. Final agreement was made contingent upon concurrence of the Community Antenna Television Association, the National Association of Public Television Stations, and the Association of Independent Television Stations.

In general, the agreement reflected the most recent FCC rules. However, NCTA also agreed to go beyond those rules -- and to provide broadcast stations with an additional right, which had not been part of the FCC's rules, to be located "on channel" when carried by a cable system (or on a lower channel in instances where the "on channel" assignment was a higher number than the cable systems had channels). NCTA also made major concessions to the broadcasters concerning cable hook-ups to multiple television sets within a household.

The Community Antenna Television Association concurred in the compromise. The National Association of Public Television Stations had the matter under consideration, but their decision was mooted when INTV vetoed the proposal.

The basic point of contention between the compromise and INTV was this: NCTA and NAB agreed that broadcasters could be vested with a legal, enforceable right to be carried on a cable system on that channel for which they had sought and received a license from the FCC to broadcast over the air. Additionally, broadcasters and cable operators would be able to arrange carriage on a different channel upon mutual consent. For example, a broadcaster and a cable operator could agree to keep a

station where it is, rather than move it to "on-channel", if that number was different. Or, a broadcaster and operator might agree to move a station to a new channel in order to cluster broadcast signals for a discount tier.

INTV, however, found this arrangement to be insufficient for their commercial interests. INTV essentially demanded broadcasters be vested with a legal right to be carried on the channel of each broadcaster's choosing. To borrow from Yogi Berra, INTV's position is like deja vu all over again. Their demand that broadcasters as a class be given preferential treatment by force of law over cable networks is precisely the reason we are having this hearing today. Their demand, if realized, would violate the First Amendment rights of cable operators and cable networks.

The Court of Appeals and the Constitution cannot simply and conveniently be ignored in order to enhance and protect the revenues of some independent broadcasters. It is NCTA's goal, Mr. Chairman, to help craft a must carry statute that passes judicial scrutiny, not one which fails for constitutional infirmity and leaves us to resolve the issue all over again.

## III. A Review of Signal Carriage in the Absence of Regulation

Although the history of government-compelled signal carriage has been an on-again, off-again proposition since the FCC's rules were challenged in 1985, the history of voluntary carriage of broadcast stations by cable operators has been characterized by stability. Every serious survey of the impact of the absence of must carry rules has produced the same result: on virtually every cable system, broadcast stations carried under the terms of the 1986 inter-industry carriage agreement continue to be carried voluntarily.

The reason is simple. Broadcast programming, especially network programming and local news provided by network affiliates, is an immensely popular component of the programming package offered by cable operators. Cable's customers demand inclusion of broadcast programming in their cable service. It is this demand that has led to the stability in broadcast signal carriage on cable and which will contribute to continued carriage.

In fact, broadcasters have become so confident they will be carried by cable systems that their main concern in this debate is no longer whether they will be carried -- they now assume that -- but on which channel they think they should be carried. Beyond that, in 1985, when the court invalidated the

old FCC rules, many broadcasters believed the sky was falling and that they would soon perish without a federal law requiring carriage. Now some have come full circle and are arguing against such a law, demanding instead that they be paid by the operator to allow carriage.

I will address these new twists later in this statement. Before that, I would like to review the facts.

The Empirical Evidence: The overwhelming majority of local broadcasters are carried on local cable systems.

In early 1988, the FCC, at the request of several ranking members of Congress, conducted a survey regarding broadcast station carriage on cable systems in light of the court decisions. Although NCTA urged all cable operators to respond to the FCC's survey, NCTA also registered with the Commission serious concerns about the design and scope of its survey. In particular, the Commission used as its baseline for adherence to a must carry standard the pre-Quincy, pre-1985 rules, rather then the more recent rules that had reflected the inter-industry compromise as an appropriate standard.

In the interest of providing appropriate and accurate data on the carriage of broadcast stations, NCTA commissioned the consulting firm of Price Waterhouse to conduct a broadcast station carriage survey to supplement the FCC's survey. This

survey, which was conducted in the summer of 1988, focused on cable system carriage of broadcast stations, as well as carriage changes, relative to the FCC's second set of must carry rules, which were struck down by the court in Century in December 1987.

The 3,966 cable respondents to NCTA's survey served 32,532,400 subscribers, or over 69% of all U.S. cable subscribers. Because nearly 70% of all cable subscribers were represented in the survey results, it is reasonable to assume that the survey data is representative of cable system carriage of broadcast stations.

Under the post-Quincy must carry rules, which were based on the joint industry agreement, broadcast stations with a threshold audience share and that met the definition of "local" were entitled to carriage, subject to a cap.

The following are the major findings of the Price Waterhouse survey:

1. Ninety-eight percent (98%) of the broadcast stations qualified for carriage under the most recent FCC must carry rules are carried on cable systems. This 98% figure includes the expanded carriage of public television stations that was required by the Commission.

2. Ninety-seven percent (97%) of the cable systems would still be in compliance with the post-Quincy rules if those rules were still in effect.

3. Ninety-one percent (91%) of the systems carrying qualified stations reported no repositioning of qualified stations.

4. Eighty percent (80%) of channel repositions reflect stations that were repositioned to cable channels equal to or lower in number than the stations' off-air channel assignments.

5. Eighty-seven percent (87%) of qualified broadcast stations are currently carried on cable channels equal to or lower than the stations' off-air channel assignments.

Thus, the survey results demonstrate that the cable industry in the absence of carriage regulations has continued to carry those stations qualified for carriage under the most recent must carry regulations.

The FCC's results produced somewhat lower numbers for carriage because they used the pre-Quincy rules as a baseline. However, their conclusion -- that the vast majority of local broadcast stations remain carried by local cable systems -- is the same conclusion reached in NCTA's survey.[13]

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13/ FCC, Policy and Rules Division, Mass Media Bureau, "Cable Systems Broadcast Signal Carriage Survey Report," September 1988.

## IV. Next Steps Toward a Fair and Reasonable Solution

I would again point out that today, even while there are no federal regulations requiring mandatory carriage of local broadcast signals, on virtually every cable system in the country, most local broadcast signals continue to be carried.

I suggest that the Price Waterhouse study demonstrates that the joint industry compromise, which formed the basis of the Commission's interim rules, remains a reasonable, workable solution to the must carry issues. NCTA continues to be willing to work with the principal representatives of the broadcast industry to produce a mandatory carriage rules similar to those we forged in 1986, but this time it may be necessary for Congress to become involved.

### A. Channel Positioning

On the matter of channel positioning, I would make two observations:

First, empirical data appears to indicate conclusively that the anecdotal "parade of horror stories" offered up by some broadcasters are more aberrational than normative. According to A.C. Neilsen, independent broadcast stations are currently

carried on cable channels equal to or lower than the stations' off-air channel assignments in approximately 91% of the instances of carriage.[14]

Second, there appears to be a wide difference of opinion within the broadcast industry itself about the appropriate resolution of channel positioning. NCTA is prepared to support a reasonable, neutral policy on channel positioning, such as mandatory on-channel assignment. However, any proposal which seeks to give to broadcasters an enforceable right to choose a channel assignment while at the same time denying similar rights to cable programmers is constitutionally suspect at best. That sort of policy, which prefers broadcasters by circumscribing the options of cable operators and programmers has already been rejected unequivocally on First Amendment grounds by the Court of Appeals in both the Quincy and Century decisions.

Further, Mr. Chairman, there is no need for "special help" for independent broadcasters. They appear to be doing quite nicely without it.

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14/ According to A.C. Neilsen there are 18,280 instances of independent station carriage involving 417 stations. Of these carriage instances, 11,884 (65%) involve independent stations which are carried on channels lower in number than the station's off-air assignments, and 4,702 (26%) involve stations which are carried on their off-air assignments. The Neilsen database does not distinguish between carriage of local and distant independents, but it is reasonable to assume that a significant portion of the independent stations carried above their off-air assignments are distant independent stations imported by the cable operator, not local independent stations that would qualify for must carry.

A look at the numbers is better than a review of some rhetoric. In 1985, when must carry was first struck down, independent broadcasters garnered a 19% audience share. Today, they pull in 25%. That increased audience has naturally led to increased ad revenues. In 1985, independent gross national spot and local advertising added up to $2.55 billion. Then they lost must carry protection and since then their ad revenues have grown by 32.5%, to an estimated $3.38 billion for 1989.

B. The Compulsory License Vs. Payment

Finally, there is a growing discordant note within the broadcast industry, struck mainly by some network affiliates, that argues against any must carry solution and in favor of signal carriage by contractual negotiations.

This approach would require repeal of cable's compulsory license, granted under the Copyright Act of 1976. While this approach might have some theoretical attractiveness, its implementation would destroy the signal carriage stability the license has helped create. Which stations get carried would be negotiable. Which programming is carried would be negotiable. And which commercials -- if any -- get carried, or get replaced by the operator's commercials, would be negotiable.

NCTA believes this approach is not in the best interest of broadcasters, cable operators, or the viewing public. It would dare broadcasters and cable operators in each market to engage in brinksmanship. The amount of local broadcast carriage would be determined ultimately by the competitive strength of a cable

operator in a market. What consumers need, I believe, and what the two industries need, is a single, reasonable, and predictable national policy on signal carriage, not a policy which can revolve around the relative strength of each industry in a given market.

Conclusion

NCTA stands ready to work with the broadcast industry and this Subcommittee to fashion a reasonable, fair, and equitable national policy on signal carriage of broadcast stations on cable systems.

Senator INOUYE. Thank you very much, Mr. Mooney. We will hear from the panel before we proceed with questioning, if you do not mind.

Mr. Fritts.

## STATEMENT OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS

Mr. FRITTS. Thank you, Mr. Chairman.

Indeed, it is a pleasure to address this committee on this issue again. And we certainly appreciate your many past courtesies in dealing with us on balancing the marketplace between broadcast, cable and all other competitors.

If I might be so presumptuous, I would like to ask if the record could be maintained open for a period of time so that we could provide the essential constitutional documentation that we think would be necessary.

Senator INOUYE. We shall keep this record open for three weeks.

Mr. FRITTS. Thank you very much.

Some 55 years ago, Congress established a system of broadcasting in this country where every community should have local service by a local television or a radio station. That service has continued and our system has flourished to the extent that it is the envy of the world. Many countries across the universe are trying to replicate it.

Broadcasting has done well through the years, and we would not deny that. Broadcasters have served their communities well through the years, through broadcast of news, entertainment, and sports. Hurricane Hugo is a good example, where the only communication to the people in that community came from broadcasting, as well as the recent earthquake tragedy in San Francisco. And I think we are all brought closer together as a nation when we identify and see and feel issues across the country.

But in the last five years, since the 1984 Cable Act came into play, the marketplace has skewed drastically. I might add that there was must carry embedded at the FCC when the Cable Act was passed in 1984. It has since been deleted through the courts.

Broadcasters no longer have must carry, as has been pointed out by a number of members of this subcommittee, and the marketplace continues to change.

When Congress gave a boost to cable, as a struggling, infant industry at that time, trying to establish itself and get a foothold to compete with broadcasters, it was the equivalent of anabolic steroids given to an athlete. Because it has taken off, literally, and has changed the entire communications landscape, not just for now, but for the future.

And if one looks at what happens in the next five years or the next 10 years in this communications landscape, if we do not add some balance to it, I think all of us are concerned where we may end up.

I think we all recognize that cable is truly unregulated. Congress itself does not regulate cable, currently; the FCC does not regulate cable; and the local franchising authorities do not regulate cable. I would submit to you that cable regulates the marketplace. I think there is growing evidence of that every day and every hour.

Broadcasters are not afraid of fair competition, but what we have now in the marketplace, because of the deletion of the must-carry rules and other incidents, is not fair competition. The marketplace is drastically skewed.

I think the single most important step that Congress can take to restoring fair competition between broadcasting and cable is to pass must-carry and channel-positioning legislation.

Now, the lack of fair competition has raised other issues of concern within our industry, primarily, whether broadcast television is being forced to subsidize cable. For example, cable developed and continues to rely upon a foundation of virtually free use of the broadcasters' product, without our consent.

In turn, cable uses the revenues it receives for our product from subscribers to buy other programming to compete against broadcasters and for advertising revenues. At NAB we have formed a task force to examine these issues and to make recommendations to you.

We agree with you, Mr. Chairman, that it is possible to draft must-carry legislation, including channel positioning, that would be constitutionally sustainable. As the courts have indicated, they never rejected must carry, per se.

We would hope that you would move expeditiously. Before the end of this year, we could see movement from your subcommittee, and perhaps even the entire Senate. We stand ready to work with you to continue to craft legislation that is in the best interest of all concerned.

[The statement follows:]

STATEMENT OF EDWARD FRITTS, PRESIDENT & CEO, NATIONAL ASSOCIATION OF BROADCASTERS

I am Edward O. Fritts, President and CEO of the National Association of Broadcasters. NAB represents 975 television stations, the major networks, and more than 5100 radio stations. NAB commends the Communications Subcommittee for holding this hearing on must carry and channel positioning issues, and we appreciate the opportunity to testify today.

Introduction.

In 1934, Congress established the broadcasting structure that has served our nation so well over the years. This system has afforded the public virtually universal access to a world of diverse information -- news and public affairs, entertainment, sports, weather, and so forth -- free of charge every day of the year. The importance of this free over-the-air system has manifested itself recently through the invaluable services it has provided during natural disasters such as Hurricane Hugo and the earthquake in Northern California. Our system of free over-the-air broadcasting has become the envy of the world. Many nations are attempting to replicate its successes.

At the same time, I will be the first to acknowledge that in certain respects, cable has been good for the television industry and good to the American public. Cable and broadcasting in many ways are sister industries, as well as vigorous competitors for the time and attention of the American public. Cable has provided a means of spreading television reception to unserved or under-served areas. Although cable in recent times has developed its own programming to supplement the television signals it retransmits, broadcast programming remains the foundation of what cable offers to its subscribers today. In addition, cable has been able to provide the public with a number of more specialized or niche services than can be offered by commercial broadcasting. Cable has the benefit of deriving its operating revenues from both advertising and customer subscriptions, while commercial broadcasting is dependent solely on advertising.

What television broadcasters and the public need, however, is the opportunity for fair competition in the video marketplace. That opportunity is glaringly absent today. Must carry and channel positioning rules will help to restore it.

The cable industry of today is far different from that of just five years ago, when Congress passed the Cable Act of 1984. Then, cable still was viewed as a struggling, infant industry. Congress intended, in part, to recognize cable as a full-fledged service, to put it on a solid footing and to promote its growth. In that you have succeeded. In November of 1980, 22.6% of American homes subscribed to cable. In November of 1984, days after passage of the Act, that number had increased to 43%. Today, more than 56% of American homes subscribe.[1]

However, another major purpose of the Cable Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue

[1] A.C. Nielsen.

economic burden on cable systems."[2] While the 1984 Act certainly resulted in minimizing the regulation of cable, it has failed totally in promoting competition in the video marketplace. Indeed, cable's success has come at great cost to competition. The deregulation spawned by the 1984 Act has permitted a rapidly growing cable industry to trample upon its video competitors, consumers, and local franchising officials. Consider events over the past five years, including cable's unchecked ability to deny carriage of local broadcast signals and to shift at will those signals it does carry, the rapid concentration and integration of cable multi-system operators ("MSOs"), deregulation of basic cable rates, and the quickening migration of once free programming to basic and pay cable outlets. If these enormous shifts of power are an accurate projection of what the next five or ten years will bring, then broadcasters have every reason to join other groups sounding the alarm against cable.

NAB's television membership is used to fierce competition, and has thrived upon it. We cannot continue to serve the public as Congress intends for us to do, however, if our competitors enjoy unfair legislative and regulatory advantages.

The 1984 Act has placed the thumb on cable's side of the competitive scales. NAB is pleased that the Subcommittee intends to hold hearings to oversee the implementation of that Act, and to determine in what ways it is in need of improvement. NAB looks forward to participating in that debate, as we believe the time has come for Congress to re-regulate cable.

Your upcoming hearings may convince you that a major structural overhaul of the 1984 Act is needed. It is clear, however, that legislation to implement reasonable must carry and channel positioning rules is an immediate step Congress can take which will go a long way to repair competitive forces in the video marketplace.

Indeed, the Act was written with a recognition of the must carry rules then in place. It was passed with the assumption that rules would remain in place. The loss of the rules through litigation has allowed cable to act as a virtual gatekeeper to the homes of America.

Cable currently has unrestricted discretion over what local stations it will carry, and where it can place those stations within its lineup. Television stations now have no assurances that they can get access to the local communities they are licensed to serve. Cable has this absolute discretion over carriage even though it enjoys a compulsory license to retransmit our local signals without our consent and virtually without payment.

For the television industry, must carry and related channel positioning rules are a must. This is the single most important and immediate step Congress can take to re-establish fair competition between cable and broadcasting.

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[2] 47 U.S.C. Sect. 521(6)

**Background**

Prior to 1980, cable and television broadcasters were on a relatively even footing. The Federal Communications Commission's must carry rule assured local television stations that they would be carried on the cable systems serving their markets. For cable, the compulsory license granted by the 1976 Copyright Act entitled cable systems to retransmit local television stations without negotiating for the rights to do so, and without any payment to those local stations. This compulsory license also entitled cable systems to carry distant signals without negotiating for these retransmission rights, at very modest rates set by the government.

This statutory compulsory license reflected the FCC's existing regulatory structure. At that time, the FCC had other important regulations in place in addition to the must carry rule. These included restrictions on the numbers and types of distant signals cable systems could import into markets, and protections against the importation of programs for which local stations already had exclusive rights (the "syndicated exclusivity" rule).

To be sure, this system was not without its flaws for both broadcasters and cable, and it perhaps was not the structure that would be created in a perfect world. Whatever its flaws, however, the old system was an honest attempt by Congress to create a delicate competitive balance between broadcasting and cable by providing each industry with certain benefits and certain burdens or obligations. The problem today is that as a result of deregulation by the FCC and certain court rulings, broadcasters have retained all of their burdens and obligations and lost all of their benefits.

By 1980, the FCC had eliminated the distant signal and syndicated exclusivity rules,[3] but the must carry rule remained in place as an important counterweight to the compulsory license. As you know, however, in 1985 the Court of Appeals for the D.C. Circuit threw out the FCC's original must carry rules on First Amendment grounds, and the same Court invalidated the FCC's revised must carry rules in December, 1987, again on First Amendment grounds.[4] The Supreme Court has refused to review either of these decisions.

In what are perhaps now cliched terms, an essentially level playing field has been radically tipped in favor of cable. For purposes of copyright law, cable has been able to convince the lower courts to treat it mostly as a "passive" antenna device that simply retransmits signals. Within the context of the must carry litigation, however, cable has been able to convince the lower courts to treat it as an active "editor," wielding both the sword and shield of the First Amendment and the Supreme Court has failed to provide any definitive word as to how cable should be treated under the First Amendment. So long as cable can exist under this legal and regulatory "best of both worlds" treatment, it has the upper hand in the marketplace.

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[3]The FCC recently adopted new syndicated exclusivity rules scheduled to go into effect on January 1, 1990. However, segments of the cable industry have appealed these rules. See discussion below.

[4]Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169 (1986); Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. Cir. 1987); clarified 837 F.2d 517, cert. denied, 108 S.CT. 2014 (1988).

**Localism and the importance of cable carriage**

Our nation's free, over-the-air television structure is erected on a foundation of local stations serving local communities. Instead of a system in which communities would be served by high power, distant regional stations, Congress enacted a system through which the needs and interests of the public would be served by local stations. Congress' goal with localism was to ensure that each community of appreciable size would have at least one station to address community needs and interests, and to permit multiple stations in communities wherever possible. This system is reflected throughout the Communications Act and FCC regulations, but finds its clearest expression in Section 307(b) of the Act.[5]

In return for their FCC licenses, television stations have statutory and regulatory obligations to their local communities. Stations are obligated to identify, and serve with responsive programming, the needs and interests of those communities. In addition, stations must provide access and equal opportunities for federal candidates and equal opportunities for local candidates.

This system can not function properly, of course, unless local television stations have access to the viewers they are licensed and required by the FCC to serve. An "open gate" between local stations and their viewers must be preserved, for stations simply cannot respond to viewers that they cannot reach.

Access to local audiences can be both enhanced by, and frustrated by, cable. As it originally developed, the cable industry was a means to facilitate reception of local over-the-air television stations. Indeed, cable first was called "community antenna television." Today, cable provides many additional kinds of programs, but retransmission of local television signals remains one of cable's most important attractions for subscribers.

Once a home is connected to cable, however, that home becomes extremely dependent upon that cable for reception of local television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on the cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate, over which the local system has control.

Both NAB and the cable industry have documented in FCC proceedings why the "A/B switch," a mechanism that ostensibly allows subscribers to select between cable and over-the-air reception, is in fact inadequate as a substitute for cable carriage of local stations.[6] For many homes, this switch will not deliver adequate off-air reception, because the over-the-air signals are obstructed by tall buildings in urban areas, hilly terrain, or even

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[5] "...the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. Sect. 307(b).

[6] A study prepared for NAB by the ELRA Group, entitled Outdoor Antennas, Reception of Local Television Signals and Cable Television, is included with this statement as Attachment 1. This is but one example documenting the inadequacies of the A/B switch.

foliage. Many viewers subscribe to cable in whole or in part to get better reception of local television signals.

Even where over-the-air reception of local signals is possible, nearly all viewers must use an outdoor antenna with the switch. In most cases, indoor antennas are inadequate.

NAB's 1985 survey of cable subscribers revealed that hardly any cable subscribers had A/B switches. Only 1% of subscribers had an A/B switch and an outdoor antenna. Many subscribers no longer had access to an outdoor antenna, either because they never owned one, they were told by the cable system that they no longer needed one, or they (or their cable system) removed the antenna once they subscribed. In many communities, outdoor antennas are prohibited or restricted, or viewers live in multi-unit buildings in which access to outdoor antennas is impossible or impractical. In addition, with increasing use of VCRs and other equipment that attaches to the television set, the installation and use of A/B switching devices has become exceptionally confusing and difficult.

In short, the overwhelming majority of cable subscribers would have to invest or reinvest in a costly and complex array of equipment to have access to local stations not carried by cable.[7] Once the equipment was installed, cable subscribers would have to use it correctly each time they wanted to view stations not carried on cable, rather than merely tune passively to whatever programming was on the cable. Cable systems thus have effective gatekeeper control over local stations' availability to the same viewers these stations are licensed to serve.

The current nationwide cable penetration rate, the percentage of homes that subscribe to cable, is more than 56% of all television households. That means that in the average market served by television, more than half the homes are hooked up to cable. If a station is not carried on those systems, it immediately loses access to more than half of its potential audience, and it must find some other way to reach those viewers.
Moreover, by 1997 cable experts predict nationwide cable penetration to reach 70%.[8] Indeed, in 29 markets, including Hartford/New Haven, San Diego, and Pittsburgh, penetration already exceeds 70%.[9]

**Alternatives to cable do not exist**

Carriage of stations on cable systems might not be such a crucial matter for local television stations if carriage alternatives were available. Such alternatives, however, do not exist in most communities. Cable systems almost never compete head-to-head with other cable systems in their franchise areas, a situation described by the cable industry as an

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[7] In 1986, NAB and NCTA estimated that the cost to subscribers of installing A/B switches and rooftop antennas would be between $843 million and $1.6 billion. It was also estimated that the cost to replace malfunctioning switches would be an additional $540 million.

[8] Paul Kagan's Cable TV Investor, May 11, 1988.

[9] Nielsen Station Index News, June 1989.

"overbuild."

Some argue that cable is a natural monopoly in the economic sense -- that it simply is uneconomical for two systems to operate in the same area. Regardless of whether or not cable is a natural monopoly, in many communities cable has been granted a legal monopoly by the local franchising authority. As a result, competition among cable systems is extremely rare. Presently, there are perhaps as many as 50 franchised cable systems (out of a nationwide total of approximately 6,500) that face competition from other franchised systems. [10]

What about the other wire into the home -- provided by the telephone company? Some day telephone companies may provide video service to the home in competition with cable, but that day still is far away. Many technological and policy hurdles must be crossed before video service via telephone systems is both practicable and pro-competitive.

Therefore, a television station denied carriage on the local cable system has no competing carrier to which it may look for access to its community. Cable subscribers who are unhappy with the local television offerings on their system cannot threaten to take their business elsewhere. Nor can the local government exercise much, if any, influence over whether local television stations will be carried on the local cable system. The Cable Act severely limits the controls that local governments can exercise over the programming carried by the cable systems they franchise.[11]

**Cable's carriage decisions impact upon local competition**

Thus, with the must carry rule gone, cable now has an important weapon at its disposal -- the discretion to carry or not to carry any or all local television stations, including the ability to require payment for carriage.[12] It is important to realize, however, that a cable system's refusal to carry a particular station affects not only what the system's subscribers view, but also it indirectly affects what will be viewed by non-subscribers. Simply put, a television station's audience size directly translates into revenue -- larger audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the downward spiral will continue.

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[10]John Mansell, editor, Cable TV Franchising, Paul Kagan Associates.

[11]For example, franchise fees paid to local authorities are restricted by Sect. 542; 47 U.S.C. Sect. 542. Local regulation of subscription rates is restricted Sect. 543; 47 U.S.C. Sect. 543. Local regulation of services, facilities, and equipment is limited by Sect. 544; 47 U.S.C. Sect. 544. Denial of franchise renewal is governed by Sect. 546; 47 U.S.C. Sect. 546.

[12]An FCC survey provided to Congress in September 1988 reflected that 869 cable systems reported not carrying or denying carriage to 704 local stations involving 1,820 separate instances of dropping or failing to carry local stations. Significantly, this was a voluntary survey to which only 50% of the cable systems responded. The survey also reported 65 stations providing compensation for coverage or channel position 326 times and 107 cable systems reporting 125 instances of compensation.

Cable systems have their thumbs on the scales of competition within a local video market. Through its carriage decisions, a system directly can determine what its subscribers view. It indirectly can affect the quality of what non-subscribers view. Thus, it affects the overall competitive status of all local television stations, whether they appear on the system or not. This subcommittee should question whether cable should be permitted to possess such power, much less exercise it.

**Cable's discretion over channel-positioning can be used unfairly**

The original must carry rules provided some protection for local VHF stations on channel positioning. Now that the must carry rule is gone, cable has total discretion over where local television stations will be positioned on their systems. Television stations' identities are created, in large part, around their channel numbers. While the cable channel on which a television station will be carried may not be as crucial to the station as carriage itself, the system's discretion over channel positioning can lead to competitive abuses.[13]

Cable systems can favor some stations by re-transmitting them on lower channel positions, while other stations can be shifted onto far less favorable upper channels, known as "Cable Siberia," where subscribers are less likely to view them. By repositioning stations to less favorable channel positions and substituting cable networks on the more desirable channels, cable operators have the power to manipulate dramatically subscribers' viewing patterns. A.C. Nielsen studies are reported to show that viewership of cable networks can increase an average of 32 percent when cable networks are placed on cable channels 1 through 16.[14] At least one cable system has lauded these statistics to its advertisers in explaining why it was repositioning its stations and programming services.[15] In addition, the New York Times recently reported that cable programming services actually pay cable systems for the privilege of being placed on channels adjacent to certain broadcast signals. For example, MTV offers cable operators discounts off of its per-subscriber charges in exchange for favorable placement -- a practice MTV describes as fairly common throughout the cable industry.[16] Cable's discretion over channel positioning is especially relevant in the context of competition for advertising dollars, discussed below.

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[13]NAB's Comments and Reply Comments in the FCC's Inquiry into the Availability of Broadcast Television Signals on Cable Television Systems, MM Docket No. 88-138 are attached to this statement. Attachment 2. The FCC's September 1988 survey indicated that 974 cable systems reported repositioning 857 local stations a total of 2,495 times. Significantly, 85% of the cable systems responding to a question as to why they repositioned stations indicated "marketing decisions."

[14]This often results because many subscribers "graze" which means in deciding what to view, they start on channel 2 and briefly view programs on each channel until they find something they like.

[15]Attachment 3

[16]"Cable Channels Bite Hands That Feed Them," New York Times, May 29, 1989. Attachment 4.

**The compulsory license -- a broadcast subsidy to cable**

Cable has many more legal and regulatory advantages over local television stations than just this crucial power over carriage and channel positioning. The compulsory license granted to cable by the Copyright Act of 1976 also provides huge competitive benefits for cable. As noted above, the compulsory license remains in place, even though the FCC regulations that were part of the balance struck by the 1976 Act have all but disappeared.

The compulsory license permits cable systems to retransmit the programming of television stations without negotiating for the right to do so, and without the consent of either the station or the program owner. Cable systems can and do use this license to retransmit the signals of local stations, to import national "superstations" (such as WTBS is Atlanta, WWOR in New Jersey, or WGN in Chicago), and to import other distant independent or network-affiliated stations. Under this compulsory license, cable systems pay virtually nothing for the right to retransmit local programming, and pay only modest government-set rates for distant signals through the Copyright Royalty Tribunal, not marketplace rates.

Under today's circumstances, our stations have no right to insist upon carriage on local cable systems. These cable systems, however, can use the compulsory license to retransmit some or all of the programs of local stations, without their consent and virtually without payment. A cable system can exercise its rights under the license to carry only a portion of our stations' programming -- we cannot insist that if any of our programming is carried, then all of it must be carried. Under the compulsory license, a cable system is permitted to "cherry pick" only those programs it wishes to carry, such as a station's highly-rated local news programs, and ignore the rest of its schedule. These rules mean that in the cable homes in our markets, we compete not only with other local stations and the multiple channels of cable programming carried on those systems, but also with a host of television programming imported from other markets.[17]

While this statement focuses largely on the importance of must carry and channel positioning legislation, the changing competitive and economic relationship between cable and broadcast television raises additional issues that should be mentioned. Cable no longer is a "mom and pop" industry that complements broadcasting. Although it has become a mature, powerful, and nationwide industry, it still continues to enjoy the unique government privilege conferred upon it in its infancy -- the compulsory license. It uses the product of its principal competitor at little cost to itself.

For example, a typical prime time program aired by a local affiliate may earn a 10 rating in cable homes, but the network that produces the show and the station that airs it receives nothing from the cable system which carries the broadcast. At the same time, a

[17]The FCC recently adopted new syndicated exclusivity rules that are scheduled to go into effect on January 1, 1990. Under the new rules, with certain exceptions, stations can require cable systems within 35 miles of their city of license to delete programs imported on distant signals for which the local station has acquired exclusive rights. The rules also allow superstations to acquire national exclusivity for any program. However, cable interests have appealed these rules and have sought to delay their implementation. There also have been reported instances in which cable systems have offered television stations continued carriage of desirable channel positions in return for a station's not exercising its syndex rights.

cable programming service may earn a 1 rating, yet the service may collect $0.25 per subscriber per month from the same cable system.

While the programming broadcast by local network and independent stations remains very popular, cable's free access to these signals has provided it with a foundation upon which it has built a broad array of cable-exclusive channels that compete aggressively with broadcasters for programming and for audience. Cable often is still thought of as supported entirely by subscription fees. Cable advertising revenues have grown dramatically, however, and are expected to continue to grow in the future.

These observations have led a number of broadcasters to question whether our industry in fact is subsidizing the cable industry. Cable has the ability to deliver the most popular and desirable over-the-air signals -- without permission or payment -- to its subscribers for a fee. It then uses these fees to help acquire programming with which it competes with broadcasting for audience share and advertising revenue.

NAB has recently established a Task Force on Cable Relations to examine these issues in more detail. This Task Force is co-chaired by the current chairman of our Television Board, Thomas Goodgame, President of Westinghouse Broadcasting and Cyril Vetter, President of WVLA-TV, Baton Rouge, LA. It will examine the extent of any subsidy to cable, and its long-term implications for our free broadcasting system. At the conclusion of our examination, we will make any appropriate recommendations to the FCC and to Congress. Our goal, again, is to return fair competition between broadcast and cable before there is lasting damage to the video marketplace.

**Incentives to act unfairly against local stations**

Cable has many legal and regulatory advantages over local television broadcasters. The mere existence of these advantages should trouble communications and copyright policy makers. Cable, however, increasingly has incentives actually to use those advantages.[18]

The goal of a television station, whether it is a network affiliate or an independent, is to make its programming as responsive to its viewers interests as possible. Through a mix of strong local programming and network and/or syndicated fare, a station seeks to create a distinct identity in its community. Cable would have you believe that their programming and carriage decisions are based only on the wants and needs of their subscribers, and the attractiveness of what television stations have to offer to those subscribers. Unfortunately, these are not the only factors that can enter into cable's decisions regarding whether local stations are carried, what other stations and programming services will be carried in competition with them, and where stations will be placed in a given system line-up.

Cable increasingly is competing with television for advertising dollars. Although cable is a subscription service, many basic cable programming services also are supported

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[18] Attachment 4 to this testimony is a study prepared for NAB entitled The Economic Impact of Cable on Broadcasting, by Dr. Michael O. Wirth. This study examines cable's incentives to drop or relocate the signals of local television stations.

by advertising. As with network television programming, some of the advertising spots on these cable services are sold by the services, while they make other spots available for sale by the local systems that carry their programming.

Cable's attractiveness to advertisers is growing. Total cable advertising, national and local, was only $58 million in 1980. In 1989, it is estimated that total cable advertising will be more than $1.96 billion. Both national and local advertising is growing on cable at a substantial rate. It is estimated that local cable advertising in 1989 will total $488 million, a 398% increase over 1984, and a 150% increase over 1986.[19]

The mere fact that television increasingly faces competition from cable for advertising dollars is no cause for government concern. If we have a fair opportunity, we will compete for advertising with cable as we do with other media. Cable has been given distinct legal and regulatory advantages over television, however, so that fair competition may not be possible. Cable systems can be programmed in ways that make cable time a more attractive buy for advertisers than television time.

The obvious way a system could encourage advertisers to buy advertising on cable rather than television is to refuse carriage to local stations that compete with the system for advertising. The system could replace a local station with a distant signal that carries similar programming, but with which the system does not compete for advertising. Even if local stations are carried, they can be placed on the less desirable cable channels, while distant stations and the favored cable channels can be placed on the more desirable channel locations. Cable systems increasingly are clustering popular television stations on channels nearby the channels of the cable services whose viewing (and hence advertising potential) the system wants to promote.

In addition to the general proposition that all cable systems are increasingly competing with television for slices of the local and national advertising pie, many cable systems have more direct incentives to favor cable programming over television programming. The cable industry is becoming more vertically integrated -- some corporations that own cable systems also are becoming more involved with cable program production. Cable systems owned by such companies now may have direct incentives to favor their parents' programming over programs offered by television stations. This direct relationship between cable program production and distribution is one of the more troubling features of the bumpy competitive landscape over which local television stations must travel.

To summarize our local carriage concerns, these are the cards with which the local cable operator can play when he sits down with a local television station: He is often in at least 56% of the homes in their markets. He can decide to carry stations or not to carry them. He can cherry pick only a portion of their programs. He will not have to bargain for, or pay for, those carriage rights, although he can seek payment from stations for carriage. He can decide to shift stations up to the equivalent of the system's "Siberia." He

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[19] Cable Television Developments, National Cable Television Association, August 1989.

can bring in distant signals or superstations. He competes with us for local and national advertising dollars. He can make any or all of his carriage decisions based on what makes him a better buy for advertisers than local television stations.

**The equation between cable and local television stations must be rebalanced**

Regulatory equilibrium between local television stations and cable must be restored. As I have already noted, must carry and channel positioning legislation will be a much-needed step in that direction.

As many of you know, NAB has been involved in negotiations with representatives of the cable industry in an effort to develop a industry agreement, which we then could recommend to Congress as the basis for legislation. Several months ago, we came very close to a compromise. Unfortunately, a final agreement could not be reached because of disagreements over channel positioning protections for local television stations.

Discussions with the cable industry are proceeding. NAB hopes that these discussions can come to fruition. We understand that Congress would prefer to proceed on the basis of a broadcast/cable consensus.

Nonetheless, I do not believe that Congress should wait indefinitely for such an agreement before it acts. The problems in the video marketplace are too great, and the need for legislation is too pressing. Congress cannot withhold action on must carry and channel positioning legislation much longer. Under no circumstances should the 101st Congress adjourn without such legislation having been passed and signed into law.

Again, NAB appreciates the opportunity to provide our views on an issue of critical concern to the television industry. We look forward to working with the Subcommittee as legislation moves forward.

Senator INOUYE. I thank you very much, Mr. Fritts.

And now may I call upon the President of the Community Antenna Television Association, Mr. Effros.

## STATEMENT OF STEPHEN R. EFFROS, PRESIDENT, COMMUNITY ANTENNA TELEVISION ASSOCIATION

Mr. EFFROS. Mr. Chairman, thank you.

Our prepared statement, as you said, thank you, is going to be in the record.

And it is remarkable that we are here once again on must carry, and we are hearing the same statements that we heard seven years ago and ten years ago, and certainly in the court cases.

Let us start by saying, as Mr. Mooney stated, that from the cable industry's point of view, we do not object to a reasonable set of must-carry rules being placed in legislation and in law. The difficulty, as you pointed out in your letter to us, was how do you do that legally? How do you do that in a way that will pass constitutional muster?

And that becomes much more difficult, as is obvious from the two attempts that the FCC made, both of which failed.

The reason they failed was, in part, because they failed to distinguish or show why one video producer should have priority over other video producers.

Now we hear a great deal, and Mr. Fritts' testimony is replete with it, about the uneven playing field and the fact that the broadcaster serves the community, and this is, by the way, what the FCC tried to use as its justification for must-carry rules.

The problem was that when you look at the facts, that is not supported. As you well know, the broadcasters have effectively eliminated the Fairness Doctrine. They have effectively opposed, for many years, legislation regarding children's programming—by the way, cable operators do not oppose that. And the reason we do not oppose it is because we exceed the limits that you are trying to impose on broadcasters today.

They have opposed any indication of the amount of time they should spend on community service programming. And I am not saying that broadcasters are not doing a good job in their communities; they are. But the broadcasters' base claim on must carry is that they are somehow special in the scheme of speakers; they somehow do something that others do not. And we would invite you, sir, to investigate that. Because we do not think it is true.

For instance, cable operators provide far more access in the local community to local groups and for anyone to speak over the medium than broadcasters do. Indeed, the broadcasters went to court and got court decisions that said that no one other than them had the right of access to the broadcast spectrum, once they were granted that license.

They did the same thing with advertising. You have had to pass laws about how much they can charge, with regard to political advertising.

And again, I am not saying that the broadcasters are doing a bad job, but the legal difficulty we have here, and what you asked us to testify on today, is how do you write a must-carry rule, let alone a

channel positioning rule, which I think legally is far more questionable and far more difficult. Because that does not have to do with any question of survival, it merely has to do with trying to get an economic edge.

But how do you write a must-carry rule that can legally support the proposition that one speaker, the only speaker in the marketplace, by the way, who is given free distribution on the broadcast spectrum, there is no spectrum fee, that spectrum was given to the broadcasters allegedly in a quid pro quo for the broadcaster to provide certain types of service to the community?

Yet, if you investigate whether they are indeed providing that service, in comparison with other providers, for instance, local access channels, local origination channels, there is more local news on the cable system in Fairfax County than there is Fairfax news on the broadcast stations emanating out of Washington, which are supposed to be licensed to serve that area. The same thing is true on Long Island.

So when you start looking at the facts, you start saying, wait, we gave a free spectrum; it was supposed to be with a quid pro quo, but over the years the FCC's regulations requiring that quid pro quo have been eliminated. Indeed, Congress is trying to get the Fairness Doctrine back.

Yet, it is the same logic, i.e., that they are doing something special, which is the only legal basis you can use, unless they say they are going out of business without this special right. And we have quotes from Preston Padden, maybe it is a different Preston Padden, that says independent TV stations, for instance, not cable, command the largest non-network share of television viewing. They are starting a massive advertising campaign in New York showing how successful they are.

So we cannot argue that they are going out of business tomorrow. What is the legal basis to say that they need this special First Amendment position?

The only thing that it can be is that they are doing something that is different, and they are not. You are requiring us, for instance, to do the exact same things on kidvid rules that the broadcaster does.

We are required to do the same thing on political broadcasting, yet we do not get our spectrum for free. We pay dearly for the ability to distribute programming, while Congress gives the broadcaster a free distribution system and they are saying, and I will quote Mr. Fritts here, that there is something—the marketplace is drastically skewed.

I would agree. One of us is paying for our distribution system and the other is not and now the one that is not paying for the distribution system and has 100-percent distribution is saying not only should they get guaranteed "must carry" on our system, which we are willing to give, but also that they should get the channel position of their choice.

It is at that point that at least the Community Antenna Television Association would draw the line, and we do not think [illegible] legally supported. That is the difficulty.

I would repeat, and then I will stop, that the cable industry—and I can only speak for CATA on this particular thing—CATA is more

than willing to support "must-carry" legislation. We do not think that channel positioning provisions in such legislation would allow it to pass legal muster. We cannot see how it would happen.

Thank you, Mr. Chairman.

[The statement follows:]

COMMENTS OF STEPHEN R. EFFROS, PRESIDENT
COMMUNITY ANTENNA TELEVISION ASSOCIATION
BEFORE THE UNITED STATES SENATE
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION
COMMUNICATIONS SUBCOMMITTEE

Mr. Chairman, members of the Subcommittee, thank you for this opportunity to appear before you today. I am President of the Community Antenna Television Association, better known as CATA. CATA is one of the two principal national representatives of cable television system operators. We represent the industry from the independent, local, operational point of view. We have been involved in the debate on the so-called "must carry" rules from the beginning. CATA called for, and participated in the original Court challenge to the constitutionality of the FCC's rules and we have been a party in every case on the subject since then. In other words, as this Subcommittee knows well, we have all been down this road before.

The important thing to remember here is that we have never challenged the notion that cable should carry local broadcast signals. Indeed we have insisted for as long as this debate has raged that cable television operators would continue to carry a vast majority of local television stations, even without government compulsion, simply because that is our business. That is what our subscribers want -- and if that continues to be what our subscribers want, then, quite naturally, it follows that that is what we will give them or we would be out of business!

CATA's position has been proved correct. The "must carry"

rules of the FCC were successfully challenged in Court and have not existed for years now. Yet, as predicted, the vast majority of local broadcast signals are indeed still carried by cable systems nationwide because our subscribers still want them to be carried. In other words, the legal challenge has little if anything to do with the logical business practice. We challenged those rules because it is antithetical to the First Amendment of the Constitution for our government to be telling any communications medium what it must or must not legally allow the public to see. It is ironic that in the federal effort to create a "public" broadcasting system, funded by the government itself, Congress took great pains to write safeguards to assure that the government would not act as a censor or promoter of given programs. Yet the "must carry" rules attempted to do just that when it came to a privately financed system of telecommunications: cable television.

We wound up with a truly astounding set of anomalies. Here was the federal government insisting that, to use a newspaper analogy, "page space" HAD to be given to a particular religious group to propound their views -- because they got a now somewhat "magical" broadcast license, while an interfaith cable channel potentially could not get on the same system because the space was expropriated at the demand of the government. We found ourselves forced to carry a particular 24-hour-a-day home shopping channel, again because the company behind it had enough money to buy a broadcast license while at the same time our subscribers were potentially denied the opportunity to see for

instance, new educational programming on the Learning Channel, or C-SPAN's coverage of our electoral process, because the government demanded that anyone who had the power and the money to buy a broadcast license got preference to that "page space" regardless of what they said, or what they did. The net result was that the government was acting as a programmer, and in some instances a very bad programmer at that.

We challenged the entire concept that the government should be in the business of telling the public, our subscribers, what they must see. We did not challenge the acknowledged value of local programming, or most local broadcasters. The proof of that is self evident. The rules are gone, The government has been removed from an inappropriate role. Yet the local broadcasters are, in the main, still carried on the nation's cable systems. They will continue to be carried.

But the political brouhaha over "must carry" continues. There are several reasons. First and foremost, the broadcast industry, as most other industries, including cable, naturally seeks any advantages it can get. In this case the broadcasters had a remarkable advantage over their programming competitors. Why? Because they did not have to justify their carriage on cable systems, they did not have to promote the idea that what they offered was what the public wanted to see, they did not have to, in other words, compete for their "shelf space" in the cable supermarket of programming. The government said they HAD to be on the cable shelf -- even if that meant no room for other pro-

gramming. That's one hell of an advantage made even more so, because the broadcasters, of all the competitors, already had a FREE, government granted monopoly on exclusive spectrum space in the community. That guaranteed that they could be seen in every home in the community even if the cable supermarket shelves did not exist! So here we had the one video programmer who had a direct, free, government granted connection to the home getting a guarantee that they would get yet another free ride to the viewer's home -- regardless of quality and regardless of whether the subscriber wanted to see them or not, while all the other programmers had to fight for, and in many cases pay for space on the alternate video delivery system: cable. If you had a deal like that, Mr. Chairman, you'd want to be sure to keep it too!

Now the broadcasters are quick to argue that cable is a "monopoly". They throw that word around a lot. But of all video programmers, they should be the most cautious about using the word "monopoly"! Think about it. Before cable came along and brought the program diversity to the public that it now enjoys, who held ABSOLUTE control over what a vast majority of the nation could see and hear? Three broadcast network programmers. Did they choose to bring us education? No. The government found that it had to create its own network, the "public" network, to get even a minimum amount of educational programming on the airwaves. Did they bring us the arts? Again, the criticism was loud that such programming was painfully absent. "Public" broadcasting had to fill that void too. The same was true for

minority programming. Even the "public" network was accused of having woefully little of that. So who were the monopolists regarding video programming to the home? (Admittedly we should not even be using the term "monopoly". "Oligopsony" or "monopsony" are far more accurate, but the propensity of "cable bashers" to recklessly and incorrectly use the term forces us to respond in kind if only to avoid further confusion.)

In any event, cable is accused of having a "stranglehold", of being a "gatekeeper" with regard to video delivery to the home. But how can that be? Do we not have a broadcast system that is totally separate and technologically independent from cable? Of course we do. The broadcasters simply want to be assured that their programming will be carried on our competitive delivery system as well as maintain their own "monopoly" (if you will pardon me) hold on the spectrum.

The charge, of course, is that with our growing market power cable operators will get to such a strong position that we will be able to foreclose carriage of local broadcasters in favor of all of our own programming. With all due respect, that allegation does not wash. The cable industry has long stated to the broadcast industry that we would be willing to enter carriage arrangements with them just as we do with other programmers. Indeed, CATA publicly proposed, years ago, that cable operators reach long-term carriage contract agreements at low cost with broadcasters to allay their fears. This is what we do with other programmers. The contracts are satisfactory for their purposes:

they appease the bankers, and they lend long term security to business dealings. Why not do the same with broadcasters?

We proposed that, Mr. Chairman, and the broadcasters turned it down out of hand. They demanded that they get special governmental sanction. They did NOT want to be treated like all other programmers. They claimed special status. The argument, of course, is that there is a compulsory license which diminishes their bargaining power to require us to pay them for their programming. This completely ignores the fact that they exist because they are given FREE spectrum space that is supposed to serve all of the public. In that way they are unique. If they would agree to pay the government for that spectrum things might be different, but that is a subject which is even too politically hot for Congress to handle!

And so the broadcasters insist on special status, guaranteed carriage while enjoying free spectrum, even in stark contrast to their contemporaneous demands to be treated just like all other First Amendment media. They demanded, and won the elimination of requirements for fairness, as well as for measurements of public service and educational programming. Nevertheless, they are here demanding sanctity when it comes to "must carry".

The cable industry, Mr. Chairman, as you know, got fed up with this entire subject. We had been telling everyone that we intended to carry stations that the public wanted, regardless of government rules. So we sat down with the broadcasters and agreed, once again, to federal rules on "must carry" that would

assure carriage -- while at the same time assuring us that we could maintain control of a majority of our channels -- that is, there was a limit on how many "must carry" channels we would have to give up. Also they assured that if subscribers indicated they were not interested in certain stations we would not have to carry them just because the station owner had the money to buy a broadcast license.

As you know, these rules failed constitutional muster too. CATA had repeatedly warned both the broadcasters and the FCC that what they were trying to do was highly prone to successful Court challenge. There is simply no supporting legal rationale for giving the broadcasters -- particularly since they already have exclusive access to all television homes -- such a major competitive advantage over other video programmers.

So here we are again. But now there is a difference. The special advantage the broadcasters seek is not only guaranteed access, but they now are demanding preferential channel placement as well! The Community Antenna Television Association Board of Directors met on this issue recently and I can tell you unequivocally, Mr. Chairman, that while we will support legislation that embodies the last agreement that CATA and the NCTA reached with the broadcasters on "must carry", we will definitely challenge any effort not only to expropriate our "page space" but also to tell us we have to put the broadcasters on the "page", in essence, of their choice.

We believe that any "must carry" rule, even if it were to be linked to a condition on the compulsory license, would be legally suspect. An unconstitutional condition is no less unconstitutional for being a condition. But we believe most of the cable industry would refrain from challenging a simple, flexible "must carry" rule that reflected the agreement we reached. Almost all cable operators in the country are operating based on that agreement now anyway. However, any effort to include preferential or grandfathered channel placement for one video provider to the detriment of all others would, we believe, not only guarantee a legal challenge, but would make any "must carry" legislation almost impossible to defend in Court.

To the degree cable operators can place broadcast signals on their governmentally assigned channel numbers we will do that -- that benefits our subscribers and avoids confusion. Any preferential channel placement, however, would be such a serious intrusion on our business, and our rights, as well as those of our subscribers, that we would be forced to argue that the entire "must carry" structure was unsupportable. Because there is enough of a problem developing ANY legal foundation for "must carry", it seems to us almost suicidal for the broadcasters, or at least a small, vocal group of them, to now insist that foundation be built on sand.

Mr. Chairman, as I noted to you in my letter of several weeks ago, CATA is willing to assist in any way we can to finally put this matter to rest. We are willing to support carefully

crafted legislation that mirrors the agreement we already reached with the broadcast industry regarding "must carry", although we think there are marketplace solutions other than legislation that would satisfy a vast majority of broadcasters. The broadcasters, however, will only start considering those alternate solutions if they are convinced that they can no longer depend on Congress to treat them with almost absolute and unquestioning deference as the unique and sole servers of the "public trust".

In that context, we would encourage you to have hearings on the relative contributions of the cable and broadcast industries toward the delivery of education to our homes and schools. The delivery of news, civics, the arts, science, and history as well as entertainment. The unwillingness of broadcasters versus the obligation of cable to serve the local community in terms of access. The millions of dollars cable has paid for the right to build its video delivery system in local communities versus the free spectrum being given to broadcasters even as their "public trustee" obligations are stripped away. We would welcome those investigations and hearings.

We respectfully suggest, Mr. Chairman, that such investigations and hearings should take place before Congress considers ANY more preferential treatment for the broadcast industry. It's time the government took a realistic look at the "balance sheet" of what the public is getting before it continues to give, or expands the "free ride" of the broadcast industry.

Mr. Chairman, thank you for this opportunity to testify before you, and I look forward to those future hearings.

Senator INOUYE. Thank you very much, Mr. Effros.

Now, may we hear from the President of the Association of Independent TV Stations, Mr. Preston Padden?

**STATEMENT OF PRESTON PADDEN, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.**

Mr. PADDEN. Thank you, Mr. Chairman. We sincerely appreciate the opportunity to participate on this panel here this morning, and I am going to try to resist responding to everything I have just heard from Steve, but I would just add that I would welcome and invite the comparison between the service offered by the independent stations and cable operators.

Our stations present an enormous amount of programming for children that we make available free to all of the children in our communities and many of our stations present prime time news.

In fact, the number of stations that present free news in prime time, a unique service in the community, has risen since 1982 from 21 stations to over 40, and one of our members in Los Angeles is about to inaugurate three full hours of prime time news, free, again, to everybody in the community.

So I would invite that comparison, and in response to Mr. Mooney's remarks I would just point out to the subcommittee that the compromise "must-carry" rules were not struck down by the Court just because the Court arrived at the Court one day and thought they were not a good idea. They were struck down by the Court because, after making the compromise, some elements of the cable industry went to court and sought to have them struck down and succeeded.

I think we all know the problem here is we have a monopoly conduit upon which many consumers are dependent for their access to television—any kind of television—and it has become vertically integrated into program services, and you have in your materials this morning a little graphic that shows the vertical integration of the Time-Warner system in Rochester, and you can see, I think, by these dotted lines, which show program services, and solid lines, which show ownership, the enormous complex of vertical integration that a local station is up against in trying to get carriage.

We think there is plenty of objective evidence that cable operators are not carrying all of the local stations. The FCC did a study. It was not my study, it was not the cable industry's study. It was the FCC's study. You asked them to do it, Mr. Chairman.

In that study, 869 cable systems admitted denying carriage to 704 stations in 1,820 instances, and when you consider that only half the cable operators deigned to respond to the survey at all, I think that number, even giving them the benefit of the doubt, is about half of what is really going on out there.

NCTA itself did a study, and their own study, in their own industry study, 205 systems, serving 2.5 million subscribers, reported they were not carrying all of the stations qualified even under the compromise of "must-carry" rules. So we think there's plenty of evidence.

The truth is, the growth of new stations has been brought to an absolute halt. You cannot sign a new station on today, because you

cannot get on the cable, and it is not that the stations would not be viable in the absence of cable. The problem is they are signing on in an environment where all the other stations are on the cable and in that environment you cannot come into the marketplace and start a new station if you are not on the cable.

You received with your materials this morning a memorandum to the editor of our magazine from a gentleman about a new sign-on station in New Orleans that has just been met with an absolute stone wall of resistance.

But there is another practice almost as bad as noncarriage, and that is the channel shifting you have heard reference to this morning, and I would just like to take a minute to explain to you our perspective on this.

First of all, it is important to understand that not all of the channels on these cable systems are equal. The cable industry has built a distribution plant in which only the first 12 channels get through to all the sets hooked to the cable, and some studies that have been conducted for the cable industry show that there is as much as 30 percent more viewing to the first 12 channels than to the higher channels.

Now, historically, most of the broadcasters were carried in the low VHF channels, but as cable has become vertically integrated into its own program services, they have done what any red-blooded American business monopolist would do. They have moved our stations out of the first 12 channel positions where they have been, moved them up to the higher channel numbers, and they have put in their place program services that they own and in which they are selling the advertising time. In my testimony and in Mr. Fritts' testimony, you will see letters from cable operators to advertisers bragging about the extra advertising value that they will get in buying time on cable channels because of these channel shifts. They have not been done for consumer convenience. They were done for the convenience of the cable operator.

Now, in the FCC survey 974 systems admitted shifting one or more stations in over 3,000 instances. It is a widespread problem. It is analogous to the screen bias issue that this Committee, the Commerce Committee, dealt with in the airline reservation system issue, where the airlines were giving a preference to their own flights and their own reservation systems, so that when travel agents would look for flights from Washington to Detroit, if it was a reservation system owned by American Airlines the first thing that would come up were all the American Airlines flights. It is exactly the same kind of thing we have here.

Now, you heard Mr. Mooney suggest that putting stations on channel is the way to solve this, and I will be the first one to admit to you that there is a certain superficial appeal to that approach. But I would like to show you, with Jim's help here, what the problem is with that, and these are representative and I will readily admit to you I tried to pick examples from the home states of members of the Subcommittee and of the Committee itself.

Channel 21, WHNS, in Greenville, South Carolina, is currently carried in the VHF band on the first 12 channels on 87 percent of the cable systems. Now, if we pass a bill that says you have to carry—the cable guy has to carry stations on their FCC-given chan-

nel number, it will not stop channel shifting. It would cause this station to be shifted on 87 percent of the cable systems that are currently carrying it, and so I do not see how on-channel carriage can be a solution to channel shifting. I think it would precipitate more channel shifting.

KPTM, Channel 42 in Omaha, Nebraska, carried in the VHF band on 86 percent of the cable systems—and I would point out that since the average capacity of cable systems is 31 channels, Channel 42 cannot even—it is not technically possible to put Channel 42 on channel, on the FCC-given channel number, because the cable operator does not have a channel 42 to offer him and so it is not technically possible.

KPDX, Channel 49 in Portland, Oregon, carried in the VHF band on 82 percent of the cable systems: again, it would not be possible to put KPDX on Channel 49 because the cable operator does not have a Channel 49.

WLVI in Boston, Channel 56: Very strong station up there with a prime time newscast carried in the VHF band on 52 percent of its cable systems.

Finally, WDRB, Channel 41, in Louisville, Kentucky, carried in the VHF band on 100 percent of the Kentucky cable systems that carry that station. If we pass a law that says the cable guy has to carry the station on its FCC-given channel number, it will cause WDRB to be shifted on 100 percent of the cable systems that are currently carrying it.

So if on channel is not the answer, what do we suggest? We think, since the cable operator put us in these VHF channel positions when he needed us, when carriage of our stations was important to his business and in our testimony—I think it is page 21, you will see statements ten years ago from my friend Steve saying that his constituents could not survive as a business if they could not have a guaranteed right to take our signals and sell them to people.

Now that they have their own programming they want to move us, we feel a little bit like the good wife that worked hard to put her husband through medical school, and now that he has the degree he is about to run off with a hotter new number.

Our suggestion would be along the lines of legislation already introduced—some of you are co-sponsors—that would give stations the right to be carried where they were being carried in July 1985, before all of this shifting started, and that would mean that the stations that have not been shifted could stay where they are, and the stations that have been unfairly shifted would get moved back to where they were supposed to be.

I would point out to you, in the brouhaha over the Time-Warner System in Rochester, you all received a letter from Joe Collins, the President of Time-Warner Cable, responding to our charges, in which he says that they have no intention of shifting the Rochester UHF, which is Channel 31, off of its current channel slot, which is Channel 7.

He has given you a letter saying they have no intention of doing that, and we think that if they are sincere there should be no objection to legislation that would enable that local station to sleep a

little better at night by knowing that not only did they not intend to move him, but they could not legally move him.

Finally, I think that to do this all in a way that is going to pass constitutional muster, you would be wise to take advantage of a link to the compulsory copyright license privileges over in the Copyright Act, and we believe it is possible to do that in Communications Act legislation without running into any major jurisdictional problems.

Thank you very much, Mr. Chairman.

[The statement follows:]

STATEMENT OF PRESTON PADDEN, PRESIDENT, ASSOCIATION OF INDEPENDENT TELEVISION STATIONS, INC.

Introduction

Thank you Mr. Chairman. My name is Preston Padden and I am President of the Association of Independent Television Stations, Inc., commonly known as INTV. Our membership includes approximately 180 commercial television stations not affiliated with one of the three major television networks.

The growth of Independent television has made a major contribution to the diversity and variety of free over-the-air television information and entertainment available to the American people. In fact, our stations have proven to be the most popular alternative to the programming of the three national networks. Nationally, the Independents account for 24% of all television viewing. And, our audience shares in the major markets are even higher.

In a very real sense, the growth of Independent television represents the fulfillment of the frequency allocation policies for free over-the-air television set forth in the Communications Act of 1934, and the diversity objectives of the All Channel Receiver Act. Moreover, our stations have made their way independently, in the marketplace, without reliance upon a compulsory license to use anyone else's program product and without the benefit of a network affiliation to feed us programming for the majority of each day. However, our stations are also the newest and the most commercially vulnerable segment of the broadcasting industry. In 1988, according to a survey conducted by the National Association of Broadcasters, the average

network affiliate station had pre-tax profits of $3.7 Million. By contrast, in 1988, the average Independent station suffered a pre-tax loss in excess of $400,000.

Because our stations are the newest and most vulnerable, we have born the brunt of anti-competitive cable actions against local broadcasters. The unregulated, vertically integrated cable monopoly has refused to carry new local stations and has shifted established stations to channel positions that are not viewable on many cable connected sets. We welcome this opportunity to testify regarding the urgent need for legislation to establish basic "traffic rules" regarding cable carriage of local broadcast stations.

II.

Cable Television Systems Have Developed As Local Monopolies Upon Which Many Consumers Rely For Access To Television

Any analysis of cable carriage of local broadcast stations must begin with the fact that cable systems have developed as local monopolies. Ninety-nine-plus percent of all cable subscribers are served by a single monopoly cable system.1/ In candid statements in industry trade publications, cable leaders frequently acknowledge the monopoly character of their distribution systems.2/ No less an

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1/ Traditional anti-trust analysis, including the Herfindahl-Hirschman Index, are simply inapplicable to industries such as cable where consumers have a choice of exactly one service provider.

2/ "I'm basically a monopolist. I don't like to admit that in public forums, but I want to be the only guy in that territory to serve cable television services there or sell services to some other people. I think they shouldn't be denied those services,



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authority than R. E. (Ted) Turner has averred in a Federal Court complaint that cable operators exercise "monopoly power" over "essential facilities".3/ Viacom, the fourth largest cable MSO, has also commenced litigation in which it describes cable -- repeatedly -- as a "monopoly".4/

The monopoly character of cable underlies the concerns of local broadcasters regarding cable carriage. Since cable has become the dominant form of television distribution, local stations excluded from monopoly systems face a severe -- often insurmountable -- disadvantage vis-a-vis those stations, and other program services, that are carried. In the absence of locally competitive wireline distribution systems, there is no competitive spur to impose "marketplace" restraints on cable behavior.

The significance of the cable monopoly is further heightened by the fact that many consumers are totally dependent upon their one cable system for access to television. Multipath signals in our urban concrete canyons, terrain obstructions and restrictive zoning provisions all contribute to consumer dependency on cable for access to television. Appended hereto as Attachment No. 1, is the affidavit

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but I want to be that link...." Marc Nathanson, CEO, Falcon Cable, Cablevision, January 18, 1988 at 36.

3/ Cable News Network Inc. v. Satellite News Channels, Civil Action File No. C83-430A, U. S. District Court, N.D.Ga., Complaint Filed Mar. 3, 1983.

4/ Viacom Int'l. Inc. et al v. Time, Inc. et al, Civil Action File No. 89-3139, U. S. District Court, S.D.N.Y., Complaint Filed May 8, 1989.

of Mrs. Muriel Henle Reis, a resident of New York City. Mrs. Reis states,

> "As a result of the multi-path interference in my apartment, I have no choice. If I wish to watch television, I must subscribe to cable."

Millions of Americans suffer from the same dependency on cable that is described in Mrs. Reis's affidavit. Ironically, it is the very existence of cable which often gives rise to this dependence. In the absence of cable, Mrs. Reis's apartment building and the buildings of millions of other Americans, would have functioning master antenna systems.

Because of this consumer dependence on cable and the absence of cable competition, neither consumers nor broadcasters have marketplace substitutes to which they may turn in the face of anti-competitive actions by local cable operators.

III.

Horizontal and Vertical Integration In The Monopoly Cable Industry Are Undermining The Goals of Diversity And Competition

Horizontal concentration of cable ownership has proceeded at a furious pace since the adoption of the 1984 Act. One single cable company, TCI, now controls access to television for more than 11 million Americans. The revenues collected at TCI's "gatekeeper" toll booth in 1988 totaled a staggering $2.282 Billion. Two large multi-system owners, United Cable and United Artists Cablevision completed a merger this year. The merged company is the third largest MSO and

is controlled by TCI, the largest MSO. The Time/Warner merger, also completed this year, represents a marriage of the second and the fifth largest MSOs.

Traditional indices of concentration, such as the Justice Department's Herfindahl-Hirschman Index, are inapplicable to cable. Since subscribers have a choice of exactly one (1) cable operator, the presence of other operators in the industry does not present real competitive alternatives for consumers. Stated another way, cable operators to whom a consumer has no access cannot act as a constraint upon the broadcast signal carriage practices of the one operator to which the consumer does have access.

Of even greater concern than horizontal concentration is cable vertical integration. Integration by monopoly cable operators into the ownership of program services poses a clear threat to both competition and diversity.

In 1976, Dr. John Malone offered the following assessment of broadcast network power:

> "The reason the networks dominate the Independents in the industry is that they buy on a national basis. They have economic leverage -- monopsony in the factors market -- and they use that leverage in order to become a national economic juggernaut." Cable Television Regulation Oversight, 94th Cong. Second Sess., Serial No. 94-138 at 1084.

Then Congressman Wirth posed the following question to Dr. Malone,

> "What assurance would be the public have that you would not become a CBS or NBC or ABC, buying up

> more and more cable systems, having your own programs and having the kind of stranglehold that has been allowed to exist in the broadcast area?" Id., at 1091.

Today, Senator Wirth's fears have been realized. TCI controls television access to 11 million homes and has equity interests in the following program services:

American Movie Classics
CNN
WTBS
Headline News
TNT
QVC
BET
Movietime
Discovery Channel
Pittsburgh Sports Channel
Mountain Prime Sports Network
Netlink
Home Sports Entertainment
Sunshine Network
Prime Sports Northwest
Pacific Sports Network
Prime Ticket Network

In Dr. Malone's own words, TCI has become "a national economic juggernaut."

Because of their vertical integration, cable operators now compete with local broadcasters for programming events, for viewers eyeballs and for advertisers dollars. Absent basic "traffic rules" regarding the operation of the cable operator's monopoly conduit, cable operators will use their control of that system to compete unfairly.

Because of the trend toward vertical integration, cable operators

now have a clear vested interest in the competitive success of some of the programming services seeking access through their conduit. You don't need a Ph.D. in Economics to figure out that the guy who controls a monopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services, including local Independent broadcasting stations, in which he does not have an equity position. Not surprisingly, after the fall of the must-carry rules, one MSO, United Cable, dubbed as its new "must-carries - services in which United has an equity position". (Multichannel News, November 3, 1986 at 39.)

As our laws stand today, a telephone company is prohibited from owning a cable system for fear that it might "favor[ing] its own or affiliated interest as against nonaffiliated interests...." [Section 214 Certificates, 21 FCC 2d 307 (1970).] And, a broadcast station is prohibited from owning a cable system to prevent it from gaining a "competitive advantage" over other stations. [CATV, 23 FCC 2d 816, 820 (1970).][5/] But, cable operators are permitted to integrate

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5/ The rationale for this prohibition is reflected in the testimony of Mr. R. E. (Ted) Turner before the House Communications Subcommittee in 1976:

> "I also am personally highly opposed to crossownership of a television station in a market owning a cable system in that market. I think that would give tremendous competitive edge to that television station, and while I think it is fine for broadcasters to own cable systems, I think it ought to be in markets where they do not own television stations. That gives them too much control over the market." Cable Television Regulation Over-

vertically into programming, and to use that integration to gain a competitive advantage over others seeking access through their monopoly conduit.

In fact, in Rochester, New York, Time/Warner has created the equivalent of a local television station on its cable system. Time even assigned itself the call letters WGRC-TV. To give its own channel an advantage in acquiring programming, in reaching viewers and in selling spots to the local Chevrolet dealer, Time/Warner can drop local broadcast stations from the system, shift their channel position, insert promos for its own channel in other cable networks, package its advertising availabilities with system operator availabilities on other cable networks, and even program its system converter boxes to automatically recycle to its proprietary program channel. Plainly, this kind of vertical integration, in the absence of "traffic rules" regarding operation of the cable system, is a virtual invitation to anti-competitive behavior.

The broadcast network/cable crossownership rule provides a particularly apt analogy here. This rule, which continues to enjoy the support of many Congressional leaders, prevents a broadcast network from manipulating the traffic on cable systems to the advantage of its own affiliates and programming. The same prohibition should apply to the cable networks for the same reasons.

The anti-competitive potential inherent in common ownership of the cable conduit and program services was clearly recognized in the

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sight, 94th Cong. Second Sess., Serial No. 94-137 at 458.

1974 "Cable Report to the President" by the Cabinet Committee on Cable Communications. A copy of that report is appended as Attachment No. 2 to my testimony. With startling prescience, the Cabinet Committee (comprised of Elliot Richardson, Leonard Garment, Herb Klein, Peter Peterson, George Romney and Clay Whitehead) expressed its competitive concerns in the following terms:

> "Cable's multi-channel technology, together with the economic imperatives of a medium that is a natural monopoly, could lead to an even greater concentration of power than exists in broadcast television. When a single cable operator has the power to control the programming and information content of all the channels on his system his monopoly power over the cable medium of expression is nearly absolute."

The solution chosen by the Cabinet Committee was a recommended separations policy. The Committee described its proposal as follows,

> "We recommend adoption of a policy that would separate the ownership and control of cable distribution facilities, or the means of communications, from the ownership and control of the programming or other information services carried on the cable channels."

Somehow, the thrust of this compelling report was lost in the rush to pass the Cable Policy Act of 1984. As a result, local broadcasters and consumers now face a vertically integrated monopoly cable industry with a clear incentive to engage in anti-competitive behavior.

IV.

**There Is Substantial Objective Evidence That Vertically Integrated Monopoly Cable Operators Have Failed To Provide Consumers With Access To All Local Full Power Broadcast Television Stations**

The most impartial and objective analysis of cable/broadcast signal carriage practices was conducted last year by the FCC at the direction of Chairmen Hollings, Inouye, Dingell and Markey. A copy of the FCC's report is appended hereto as Attachment No. 3. If this report suffers from any shortcoming, it is that it almost certainly understates the level of cable misbehavior.

First, the data submitted by cable systems was on a purely "voluntary" basis. Only 50.6% of the cable systems surveyed returned their questionnaires at all. The over 4,000 cable systems that refused to respond are more likely to be the systems that had more to hide than those that voluntarily disclosed local signal carriage information.

It is also significant that the Commission "had to rely on the [cable operator] survey participants for the accuracy for the data provided." FCC Report at Paragraph 3. This means that every mis-statement or under-statement of the number of local stations denied carriage by a cable systems went completely undetected by the Commission.

However, even the incomplete and probably skewed data submitted by cable systems to the Commission demonstrates graphically that denial of carriage of local television stations by cable systems is extremely widespread. The Report reveals, among other things, that:

(1) Of the 4,303 cable systems that voluntarily

disclosed data to the FCC, 869 systems admitted denying carriage to 704 television stations in 1,820 instances.[6] Moreover, 279 of the stations dropped, involving 753 instances of non-carriage, were eligible for must-carry status even under the limited "compromise" post-Quincy must-carry rules agreed upon by both the cable and broadcast industries.[7]

(2) 241 of the reporting cable systems have denied carriage to three or more local stations, and 113 systems have denied carriage to four or more stations.[8]

(3) The vast majority of local independent stations dropped by responding cable systems -- at least 378 of 485 (78%) -- were located within 50 miles of the cable headend.[9]

(4) By far the most frequent replacement for a dropped local television station is a basic cable network -- the program services in which cable operators often own equity interests and/or profit from local advertising sales.[10]

(5) In 236 instances, reporting television stations made cash payments or supplied other consideration (usually equipment) in return for continued carriage on cable. At least 120 of these payments exceeded $45,000 per year.[11]

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6/ FCC Report, Table 2.

7/ Id., Table 2A. These figures are extrapolated and therefore approximate.

8/ Id., Table 4.

9/ Id., Table 7.

10/ Id., Table 8.

11/ Id., Table 14. 120 instances of cash payments and an additional 30 instances of a "combination" of considerations were reported. Id.

It bears repeating that these are numbers supplied voluntarily by the one-half of the cable systems surveyed by the Commission that returned their questionnaires. Even among these systems that came forward, more that 20 percent (869 of 4,303 systems) have dropped one or more local stations from their channel lineups in 1,820 instances. If one makes the extremely conservative and optimistic assumption that the incidence of non-carriage of local stations on the part of cable systems that did not disclose information to the FCC is roughly the same (and that none of the reporting cable systems understated their non-carriage of local stations), it would mean that approximately 1,700 cable systems have denied carriage of local free television stations in approximately 3,600 instances. Thus, any way that one looks at these numbers, the FCC Report reveals clearly that non-carriage of local stations by cable systems is a serious problem numbering in the thousands in terms of both cable systems and incidences of non-carriage.

The National Cable Television Association also conducted its own study of cable broadcast signal carriage practices. NCTA's report is too self-serving and biased to be accorded any significant evidentiary weight. However, even the NCTA report revealed that 205 cable systems that chose to respond were not carrying, and 2.5 million cable subscribers were not seeing, all the local stations "qualified" for carriage under the watered down "post-Quincy" compromise must-carry rules. NCTA Report at 7, Table 1. In short, even the cable industry's own self-serving data demonstrates the existence of a

problem.

To supplement the aggregate numbers in the FCC and NCTA surveys, INTV last year prepared a compendium entitled "Free Television Under Siege". Copies of that report are being submitted along with this testimony. The report is divided into three sections. Section I contains synopsis of cable mis-deeds in local markets all across the country. Section II contains letters from local broadcast stations describing their difficulties in greater detail. Section III is an appendix which contains various evidentiary materials (including letters from viewers and cable operators) relating to these case histories. Denials of cable carriage have had a tremendous negative impact on local broadcast stations. Twenty-three commercial Independents are in various stages of bankruptcy proceeding. While cable carriage practices were not the sole cause of these bankruptcies, they certainly were a contributing factor. Dozens of other stations have been forced to cease operations or convert into "home shopping" outlets.

New sign-on stations have met with a virtual stonewall of cable resistance. The absence of must-carry regulations has resulted in a dramatic increase in the number of unbuilt television broadcast construction permits being surrendered to the FCC. Appended hereto as Attachment No. 4, is a copy of a letter notifying the FCC of the cessation of operation of an Independent station <u>because of</u> the inability to secure cable carriage.

Plainly there is substantial impartial evidence that cable operators have failed to provide consumers with access to all local

full power broadcast television stations.

V.

**There Is Ample Impartial Evidence That Cable Operators Have Engaged In Anti-Competitive Shifting Of The Channel Positions Of Local Stations**

Many cable operators have been reluctant to provoke government sanctions by dropping local broadcast stations. However, system operators have not been reluctant to employ an anti-competitive tactic almost as damaging as non-carriage -- channel shifting.

Cable operators have built distribution plants in which all of the channels are not equal. The first twelve channels (2-13) get through to all cable connected sets. However, the higher channel numbers (14 and above) are not viewable on many cable connected sets. Local stations shifted to a channel position higher than 13 cannot be received at all on many television receivers. Non-"cable ready" sets that are connected to a cable without a converter box receive via cable only those stations and program services carried on channels 2-13. These conditions frequently exist in apartment buildings, hotels and on second and third sets in private homes (recreation rooms, bedrooms, etc.). Being shifted up is the equivalent of being removed from the system with respect to these television sets. Thus, cable system operators are able to inflict competitive injury on local Independent stations by moving them from desirable low number channel positions to "cable siberia".

In the FCC's survey, 974 of the cable systems responding admitted that they had channel shifted one or more local stations in almost

3,000 instances. FCC Report at Table 10. Only 15% of these shifting instances were attributable to "technical" reasons. Id., at Table 13. In almost every instance, the stations shifted have been replaced by cable program services in which the system operator is selling advertising and/or in which the operator has an equity interest. INTV conducted its own unscientific study of 70 instances of channel shifting on TCI cable systems as reported to our Association. In 65 of those 70 instances, the original channel position of the local station was subsequently filled with a program service in which TCI had an equity interest.

INTV's report "Free Television Under Siege" is replete with examples of anti-competitive channel shifting by cable operators. Moreover, these channel shifting problems continue to occur on an almost daily basis. On January 1 of this year, the leading Independent station in West Palm Beach was shifted, without any warning, from channel 9 to channel 29 on a major local cable system. Repeated efforts to resolve the issue with the local cable manager, and with senior corporate officials, have proven fruitless. Appended to this testimony as Attachment No. 5, is an article dated September 14, 1989 from The Palm Beach Post that describes the continuing channel shifts in that area.

In December, 1988 KICU-TV in San Francisco, was shifted off of channel 6 to make room for a cable barker channel promoting the system operator's proprietary pay-per-view service. On January 27 of this year, the TCI system in Millbrae, California, moved three local Independent stations out of the VHF band and replaced them with

three cable program services (CNN, American Movie Classics and The Discovery Channel) in which TCI holds substantial equity interest and in which TCI sells advertising availabilities. The stations received no notice of the shifts which occurred just three days prior to the start of the critical February Nielsen and Arbitron rating period. One of the stations commissioned an independent, professional survey that showed that 20% of Millbrea cable households with "second" TV sets, who could formerly receive the station on those second sets, are no longer able to do so because of the channel shifts.

In several communities across the country, following system "upgrades", local stations have been shifted to high UHF channels that most consumers cannot receive even on their primary set. Typically, these systems expand from 36 to 54 channel capacity, but require consumers to disconnect their old 36 channel converter boxes and drive to the cable office to trade for new 54 channel boxes. In the meantime, local stations shifted to channel positions between 36 and 54 cannot be viewed via cable.

Channel shifts are not a product of consumer demand. In virtually every instance, the local stations shifted are more popular (higher ratings), than the cable program services that replace them. Shifts are made solely to enhance the competitive position of the cable operator's programming and his advertising availabilities. Any doubt regarding the motivation for the cable channel shifts can be resolved by the candid explanation of one major MSO -- Jones Intercable. In a May 27, 1987 letter to advertisers, Jones described its motivation for a recent channel shift as follows:

"On March 1, 1987, Jones Intercable made changes that greatly enhanced the value of advertising placed with us. On that date, we realigned our channels bringing four of the five channels (The Nashville Network-4, Cable News Network-6, ESPN-12, and USA-8) on which we insert advertising to channel positions between 2 and 13.

"Studies performed on viewership patterns on channels 2 through 13 show that they are viewed 30% more often than higher channel positions. This means that the advertiser's exposure to area consumers increased greatly without additional cost."

In sum, there is ample objective evidence that cable operators have engaged in anti-competitive channel shifts.

VI.

<u>There Are Compelling Anti-trust, Copyright And Communications Policy Reasons Why Congress Should Adopt Must-Carry And Channel Shifting Legislation</u>

Congress should adopt carriage and channel position "traffic rules" for three distinct reasons. The first is anti-trust. It is simply inconsistent with the entire thrust of our anti-trust laws to permit cable operators, who enjoy monopoly power and control "essential facilities", to use that control and those facilities to compete unfairly against local stations in the programming and advertising marketplace. <u>Local broadcast stations should not be denied carriage or rooted out of long held cable channels just because the system operator has vertically integrated into programming</u>.

The second reason for Congressional action deals with copyright.

Congress has conferred upon the cable industry the extraordinary benefit of a compulsory copyright license. This license enables cable operators to take, then to sell to consumers, all of the programming produced or purchased by local broadcast stations. The cable operator pays nothing for all of this programming which constitutes the most valuable portion of the service that it sells to consumers.

Having conferred this extraordinary privilege upon the cable industry, it seems incumbent upon the Congress to require that cable operators not unfairly abuse local stations. Simple equity and fairness require that cable operators show some modicum of consideration toward the local broadcaster upon whom the cable operators have built their business. Many cable program services include the issue of channel position when they negotiate carriage fees with cable operators. Because the compulsory license gives cable operators an absolute claim on our signals, we are precluded from engaging in such negotiations.

It is more than a little ironic that just a few years ago, cable operators were begging the Congress to guarantee their right to carry broadcast signals. Congressman Lionel Van Deerlin, then Chairman of the House Communications Subcommittee had proposed a "rewrite" of the Communications Act. Section 453 of Chairman Van Deerlin's bill contained a retransmission consent provision. This provision would have required cable operators to serve the affirmative consent of the broadcast stations they wished to carry.

Fearing that broadcasters would withhold their consent, cable

operators uniformly opposed this proposal. Mr. Ralph Baruch, then Chairman and CEO of Viacom testified on behalf of NCTA as follows:

> "I believe ABC, CBS and NBC networks will refuse it and the local broadcasters will refuse it. Without the foundation of these signals, cable television cannot obtain customers, the base on which it builds its business." The Communications Act of 1979, Hearings before the Subcommittee on Communications of the Committee on Interstate and Foreign Commerce, House of Representatives, 96th Cong., 1st Sess., Serial No. 96-123, at p. 132.

Having built its business by carrying local stations on channels 2-13, the cable industry should not now be permitted to drop those very same local stations, or to shift them to "Siberia".

Other cable witnesses echoed NCTA's pleas for a government guaranteed right to carry local stations. My friend Steve Effros, President of CATA, argued that stations would withhold consent and described the likely consequences this way:

> "That local cable system is going to die, because if you can't even show the local programs, which is the basis of what the cable system started out as, that cable system is going to lose its customers to Weingard Antenna or whoever else makes the antennas they are going to stick on top of the hill." Id., at 169.

Mr. Richard Leghorn, lately the leading (and virtually only) fan of so-called A/B switches, argued that agreement to grant retransmission consent to cable operators should be made a condition of receiving a broadcast license. Id., at 1197.

This testimony stands in sharp contrast to the cavalier and anti-competitive attitude that many cable operators exhibit toward local broadcasters today.

The third reason for Congressional action is communications policy. Cable program services are available only to those with the financial capacity to pay. By contrast, broadcast stations are the quintessential democratic medium, available equally to rich and poor. As a matter of fundamental communications policy, the pay medium that lives off the free medium should not be permitted to simultaneously undermine that free medium through denial of carriage or channel positioning practices.

In 1962, Congress passed the All Channel Receiver Act to ensure that UHF stations would have equal access to viewers. Now, built on a base of broadcast retransmissions, cable has become the primary means of television delivery to over half the nation's households. However, cable technology has evolved in such a way that not all channels can be received via cable on all sets. And the cable industry has systematically relocated local UHF stations to those cable channels that cannot be received by many sets. These channel shifts are an affront to the spirit, if not the letter, of the All Channel Receiver Act.

Non-carriage of local stations and channel shifting also undermines all of the public interest goals of broadcast regulation. Broadcasters are required to provide a program service attuned to the needs of their community of license. Local stations must provide access for candidates for federal elective office. These and myriad

other public interest objectives of broadcast regulation are undermined when monopoly cable operators fail to provide consumers with access to all of their local broadcast stations.

VII.

**There Are Many Details And Technical Considerations That The Congress Should Consider In Crafting Its Legislation**

In crafting broadcast signal carriage and channel position legislation, the Congress should take into consideration the following factors.

A. **A/B Switches Are No Substitute For Must-carry**

One point on which the broadcasters and most cable operators agree is that so-called "A/B switches" are not a responsible, effective or adequate means to assure consumer access to local television stations. In fact, the National Cable Television Association has prepared an exhaustive engineering analysis which demonstrates that A/B switches frequently fail, wear out quickly, and would pose a threat to both consumer safety and air navigation (because of increased signal leakage on aeronautical frequencies).

Even if A/B switches worked, they would be of absolutely no use to the millions of consumers who have no access to an effective antenna for off-air reception. Millions of Americans who live in our urban concrete canyons, areas with terrain obstructions or in areas with zoning restrictions have no effective antenna to which an A/B switch could be connected.

On this point the record is clear and uncontroverted. A/B

switches are not the answer.

B. If the Words Must-carry Are To Mean Anything, Local Stations Must Be Viewable, Via Cable, On All Cable Connected Television Receivers

Through a variety of channel assignment and cable installation practices, many system operators have created a situation in which "must-carry" signals cannot be viewed via cable on many cable connected television receivers. In our view, these channel assignment and installation practices distort the plain meaning of the words "must-carry".

Quite plainly, if "must-carry" legislation is to mean anything, it must assure that cable consumers can view their local television broadcast stations. It is a cruel and cynical hoax for the cable industry to describe as "must-carry" compliant, a set of circumstances under which consumers cannot view a local station on a cable connected set.

We commend to the Subcommittee the language of S. 177 which required that "must-carry" signals be viewable via cable on all cable connected television receivers.

C. A So-Called "On Channel" Policy Would Cause More Channel Shifting Than It Would Cure

Cable advocates frequently offer a policy of so-called "on channel" cable carriage as a purported solution to the channel shifting problem. However, the truth is that cable's "on channel" proposal is a disingenuous propaganda ploy.

To begin with, there is no inherent relationship between the

over-the-air frequency or channel number of a broadcast station and its assigned slot on a cable system. If there were such an inherent relationship, non-broadcast services could not be carried at all since they have no FCC assigned channel numbers.

Second, "on channel" carriage is simply not possible for approximately half of all UHF stations. The channel capacity of the average cable system is 31 channels. However, approximately half of the UHF stations have FCC assigned over-the-air channel numbers higher than 31. Thus, they cannot be placed "on channel" on cable systems.

Moreover, as noted above, only the first 12 channel positions (2-13), get through to all cable connected sets. Therefore, a policy of "on channel" carriage would severely discriminate against UHF stations in a manner contrary to at least the spirit of the All Channel Receiver Act.

But, the greatest flaw in the "on-channel" proposal is that it would cause more shifting than it would cure. Most UHF stations are presently carried in the first 12 channel positions on many cable systems. For example, WHNS operates on over-the-air channel 21 in Greenville, South Carolina. However, it is carried on the first twelve cable positions (mostly on channel 12) on 87% of the local cable systems. Plainly it would be a gross disservice to this local South Carolina Independent station to adopt legislation authorizing, or directing, cable operators to shift it to less desirable high number channel positions.

Similarly, station KPTM operating on over-the-air channel 42 in

Omaha, Nebraska, is carried in the first 12 slots on 86% of its cable systems. KPDX, over-the-air channel 49 in Portland, Oregon is carried on channels 2-13 on 82% of local cable systems. WLVI, over-the-air channel 56 in Boston is carried in the first 12 channels on 52% of its cable systems. KHTV, over-the-air channel 39, is carried on channels 2-13 on 80% of the systems in the Houston ADI. And, WDRB, over-the-air channel 41 in Louisville, Kentucky, is carried on channels 2-13 on 100% of the Kentucky cable systems that carry the station.

There is no doubt that cable operators want to relocate local UHF Independent stations to high numbered "on channel" positions in order to enhance the salability of the cable operator's own advertising availabilities. The letter from Jones Intercable to cable advertisers quoted above clearly reflects the anti-competitive objectives at work here.

The preferential value of low numbered cable slots, and the system operators' interests in favoring his own product there, are reminiscent of the controversy surrounding airline owned computer reservations systems ("CRS"), with which the Commerce Committee is familiar.

In the early 1980s Congress became aware that the largest airline-owned CRS's, including the American Airlines "Sabre" system (43 percent market share in 1985), practiced a "display bias" -- that is, the CRS would display its owner's flights in a prioritized or highlighted fashion over the flights of competing airlines. Congress directed the Antitrust Division of the Justice Department (DOJ) and

the Civil Aeronautics Board (CAB) to investigate and report on these and other alleged anti-competitive practices. DOJ issued a report finding that airline-owned CRS's did indeed incorporate such biases and that the airlines used their CRS's to weaken competition from other airlines.

In 1983 the CAB issued final rules prohibiting such display biases and other discriminatory access practices by CRS's. These rules, codified at 14 C.F.R. Part 255 (and implemented by the Department of Transportation following the 'sunset' of the CAB) were upheld on appeal, and remain in effect today. See United Air Lines, Inc. v. CAB, 766 F.2d 1107 (7th Cir. 1985) (hereinafter "UAL"); Republic Airlines, Inc. v. United Air Lines, Inc., 796 F2d 526 (D.C. Cir. 1986); 14 C.F.R. Sec. 255 (1989).

More recently, on June 22, 1989, DOJ announced that it would file suit to block the proposed merger of the American and Delta Air Lines' CRS's (which combined control almost 50 percent of the CRS market) on the antitrust ground that such a combination would reduce competition in both the market for air travel and the sale of CRS services to travel agents. American and Delta immediately abandoned their joint venture. New York Times, June 23, 1989, p. D-1.

This now-prohibited CRS "biasing" practice is directly analogous to the displacement of local television stations from preferred cable channels in favor of cable program services in which the monopoly cable operator has a direct financial interest. In upholding the CAB's action in the 1985 UAL case, the Seventh Circuit found that "airlines that owned computerized reservation systems derive

substantial revenue from the additional airline business that they get from 'biasing' the system, that is displaying flight information in a way that favors their own flights," 766 F.2d at 1110; that every other airline "thus [was] dependent for an essential facility on what may be its principal competitors," id. at 1114; and the "[a]gencies... have been allowed to decide such antitrust questions as whether a particular firm or group of firms has or is abusing or is likely to abuse market power, which are the very questions involved in the present case," id. at 1120, citing Illinois Bell Tel. Co. v. FCC, 740 F.2d 465 (7th Cir. 1984). Indeed, the court so found despite the fact that, unlike cable television systems' monopolies, no CRS monopoly existed and stated that "[i]f one airline owned all of the computerized reservation systems, we would have a conventional antitrust monopolization problem of the 'bottleneck' variety." Id. at 1114.

The CAB/DOT rules and the UAL decision demonstrate that channel shifting legislation is lawful and appropriate where a firm "is abusing or is likely to abuse market power." UAL at 1120. It is clear that Congress and the FCC have full jurisdiction over cable television signal carriage. See, e.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984). Finally, such a provision would not abridge a cable operator's "speech" rights, but rather would curb its ability to exercise a bias in the placement of its "own" services vis-a-vis those of other providers. UAL, supra.

D. Must-Carry And Channel Shifting Legislation Should Be "Linked" To The FCC's Authority To Designate Those Channels Permissible For Carriage For Free Under Title 17

Despite the recent holdings of the United States Court of Appeals for the District of Columbia, must-carry and channel shifting legislation, premised on an adequate and appropriate record, would likely be found constitutional. However, an added measure of assurance in this regard can be provided by linking the must-carry and channel shifting legislation to the FCC's authority under Title 17 to designate those broadcast signals which cable operators may take and retransmit for free. Specifically, Section 111 of Title 17 permits cable retransmissions of broadcast signals only "where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission." 17 U.S.C. Section 111(c)(1). By amendments to the Communications Act, Congress should direct that the FCC's regulations in this regard include the requirement that cable systems carry all local signals, and carry them in compliance with Congressionally directed channel position requirements. Without modifying the Copyright Act, Congress could build an extra measure of constitutional assurance into its must-carry and channel shifting provisions. Such statutory provisions would not impose any limitations on the free speech rights of cable operators, but would merely affect the manner in which cable operators must pay for the broadcast programming they wish to re-transmit.

**E. The Structure Of New Legislation Should Anticipate Increased Fractionalization, Decreased Audience Shares And Other Likely Changes In The Future Of The Video Marketplace**

The FCC's "Compromise" must-carry rules incorporated a provision requiring stations to demonstrate a 2% share of viewing in non-cable homes in order to be qualified for carriage. Any similar provision included in must-carry and channel position legislation must anticipate the increased fractionalization and decreased audience shares likely to be found in the video marketplace of the future.

As cable penetration continues to grow, finding a representative sample of non-cable homes in which to conduct ratings surveys will become increasingly problematical and costly. For this reason, any audience requirements should be pegged to all homes and not just non-cable homes.

In the video marketplace of the future, most consumers will have access to 50 or more channels. Moreover, all of those channels are likely to become more competitive. In a 50 channel environment of competitively equal channels, a 2% share would reflect an average audience size, not a substandard audience size. For this reason, the 2% share requirement in the compromise rules should not be included in new legislation. This is just one example of the need for Congress to carefully analyze future market trends in crafting its legislation.

**F. To Anticipate HDTV, Local Stations Should Be Assured Bandwidth And Other Technical Specifications No Less Desirable Than Those Provided To The Cable Operators Own Vertically Integrated Services**

Forthcoming legislation should anticipate future ways in which cable system operators could discriminate in favor of their own vertically integrated program services and against local broadcast stations. Clearly, the advent of high definition television will present cable operators with such an opportunity. By providing larger bandwidth and superior technical specifications to their own program services, cable operators could create an environment in which consumers received advanced television images of only cable program services.

A simple, and eminently equitable, solution would be to provide local broadcasters with "most favored nation" status vis-a-vis cable program services. Cable operators should be required to provide bandwidth and other technical specifications no less desirable than those provided to the cable operators' own vertically integrated services.

**G. Technical And Conforming Amendments To The Copyright Act Will Be Required To Assure That All "Must-carry" Stations Are "Copyright Free" To Cable Operators**

In drafting its "must-carry" legislation, Congress should take care to assure that "must-carry" stations are "copyright free" to cable operators. Technical and confirming amendments to the Copyright Act may be required to assure that inadvertent conflicts are not created.

Senator INOUYE. Thank you very much, Mr. Padden.

Now, the President of the National Association of Public TV Stations, Mr. David Brugger.

## STATEMENT OF DAVID BRUGGER, PRESIDENT, NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS

Mr. BRUGGER. Thank you, Mr. Chairman. Good morning to you and members of the subcommittee. I appreciate the invitation to testify before this subcommittee because there is a need to assure that the American public has access to public television services that it supports through its tax dollars and through its direct contributions.

My written testimony reviews the importance and need for our unique, noncommercial services. It recounts the extensive government history and interest in reserving channel space and in providing funds for those services. It recounts the constitutional concerns with previous must-carry rules and how they can be overcome. It gives clear examples of what can and does happen to our station services when they have no legal protections, regardless of the best intentions that are stated.

It demonstrates our audience's lack of access and how that affects their ability to take advantage of our services, especially the educational services. In sum, it makes the case for mandatory carriage for the country's only comprehensive noncommercial public television service.

My concern here today is that we not lose sight of the public's right to its tax-supported services provided by stations that are, for the most part, licensed to publicly supported state and local institutions.

The must-carry issue is but one step in addressing the proliferation of technologies that are going to be capable of carrying the services in the future. Interest in the current information revolution should call for a renewed approach to a national policy that would govern the nation's communications environment.

Just as this country has long held untouchable the land for roads, schools, parks, colleges, and libraries, it has been national policy to protect these resources and the public's access to them.

It was the articulation of such a national policy by the FCC in 1952 that reserved space for these noncommercial public services. The vision of what public television can be has not changed since that time. What has changed is the comprehensive use of this medium for profit, and that has created the overwhelming perception that television and its extensions are passive entertainment vehicles. Without the counterbalancing protection of the vision that would use this medium for public service and education, that perception inches toward a self-fulfilling reality.

My written testimony has addressed the impact of the elimination of must-carry rules on public stations and on their services. There is always an attempt to minimize that impact as if we have to have a cataclysm before action is necessary.

It is enough for us to know that our access to our viewers is governed by economic models and, on occasion, by whimsy to understand how fragile the public's right to access may be.

My written testimony calls for the reinstitution of carriage rules. We want to assure all public television services are carried in each community, regardless of whether those services require one, two or three channels.

If the local community decided that they wanted to have more than one service, then they should have a right of access to it.

My written testimony addresses how such rules may be fashioned to serve the public interest and to withstand court review. Under the Quincy decision, the court sought something beyond intuition by the Federal Communications Commission in making its case.

The FCC has collected data that can supply the courts what they are looking for. In June of this year the Supreme Court suggested that lower courts refrain from second-guessing the government's interest and reasonably chosen regulations. Under the O'Brien decision the government regulations that incidentally burden speech are constitutional if they serve a substantial government interest.

Considering the investment of local and State and Federal governments and public institutions in public broadcasting services, who can deny the self-evident substantial government interest. If only the profits of commerce are going to govern the access to vital public services, this country's attempts to deal with public service and education will truly make us a nation of haves and have-nots.

What we want is equity for all citizens. That means that you must assure access to public TV services as a public right and not a class privilege.

I thank you, and I welcome your questions.

[The statement follows:]

**Testimony**
**of**
**David J. Brugger**
**President**
**NATIONAL ASSOCIATION OF PUBLIC TELEVISION STATIONS**
**October 25, 1989**

**Introduction**

The National Association of Public Television Stations (NAPTS) is pleased to provide testimony to this subcommittee as it conducts hearings on cable carriage of local broadcast signals.

NAPTS is a nonprofit membership organization whose members are the nation's public television station licensees. Public television stations are grateful for the opportunity to present to this subcommittee their concerns about the need to guarantee to the American people free access to the nation's only publicly-funded noncommercial television programming services.

Our major concerns on this issue are:

- Public television is a public service operated solely in the public interest and should be considered in a context different from commercial interests;
- The "must carry" issue for public television is to ensure unimpeded access to public television's educational and other programming services for all Americans;
- There are substantial government interests in maintaining access to public television services;
- Must carry requirements are necessary to preserve access to local noncommercial public television service;
- There is harm to the public interest from not maintaining must carry provisions;

- Must carry regulations can be forged to protect government interests without violating constitutional restrictions;
- The interim rules did not offer adequate protection; and
- Mandatory carriage of local public television services on cable's basic tier is necessary to serve government and public interests.

**The Public Interest in Public Service Programming and the Role of Cable**

Public television's mission is to provide high-quality and diverse programs and services that educate, enlighten and entertain the American viewing public — programs and services that are accessible to all Americans. More than 100 million Americans weekly watch public television programs. Public television offers educational services ranging from pre-school to continuing adult education in the home, the classroom and the workplace. Programs that present the best of the country's performing arts reach millions of households where people might never have access to these artists.

The 341 local public television stations that serve our citizens with noncommercial, educational programming services actually have been able to improve their services with the development of the cable television industry in America. Delivery of public television services by cable has extended the reach of some stations over the past two decades. According to our most recent coverage statistics, 98 percent of the nation's households receive public television; four percent of that coverage is due to cable's extension of our over-the-air reach. Since more than 62 percent of public television stations operate on UHF channels, cable also has improved the reception quality and ease of access to public television signals for many viewers.

Just as important, at this stage, however, is the control cable operators have over the public's continued access to public television services. For more than 55 percent of this nation's television households, the programming choices are largely made available through their cable service. For public television to achieve the public interest goals set for it by Congress and expected of it by the American public, carriage of public television services on cable systems must continue.

**The "Must Carry" Issue for Public Television**

Simply put, the "must carry" issue for public television is consistent with a broader public policy principle: the American public should have unimpeded access to public television services that exist to service the public interest and which have been supported by their tax dollars and direct contributions. This can be accomplished, in the case of cable distribution, through "must carry" rules. The same principle, however, should govern public policy toward other program distribution technologies as well.

To impede access to these services is to cut off the public from one of their public institutions. In fact, in the case of two thirds of America's public television stations, to impede access to their services is to disrupt the ability of state governments, universities and local government — the stations' licensees — to educate, communicate with and serve their citizens.



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**Public Television Serves Substantial Government Interests**

The history of noncommercial broadcasting in this country clearly speaks of the government's interest in providing its citizens with high quality, diverse, educational and cultural programming through the incentive of a federal investment and, more importantly, with federal policies that enhance the public's opportunity to receive this programming.

Public broadcasting's many achievements over the past decades would not have been possible without the wise policy choices and vision of lawmakers who saw the potential of a noncommercial, educational broadcasting service for the nation's schools and colleges and for the American public. This federal investment has resulted in a public television service exemplifying the role media can play in building better communities and as a catalyst in community problem solving.

Federal Interest in Public Television. The federal government recognized the need for noncommercial broadcasting as early as 1952 when 242 channels were set aside in the spectrum by the FCC for the exclusive use of noncommercial television. The first station, KUHT, was established by the University of Houston to bring higher education to the people of its community. Ten years later, Congress realized that unless the process of getting educational stations on the air quickened, commercial television might lay claim to that small segment of spectrum reserved for education and public interest. As a result, the Congress passed the Educational Television Facilities Act, now the Public Telecommunications Facilities Act, to ensure the nation's capacity to provide public education services.

Just as important, at this stage, however, is the control cable operators have over the public's continued access to public television services. For more than 55 percent of this nation's television households, the programming choices are largely made available through their cable service. For public television to achieve the public interest goals set for it by Congress and expected of it by the American public, carriage of public television services on cable systems must continue.

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In 1967, Congress concluded that the best efforts exerted by state and local governments, private businesses, individual contributors and philanthropic organizations alone could not bring to fruition the promises of educational broadcasting. After a series of exhaustive hearings, studies and deliberations, Congress declared that it was in the nation's best interest to support the use of these channels for instructional, educational and informational purposes. Congress recognized that the "marketplace" alone could not be relied upon to make adequate provision for noncommercial, educational uses. By enacting the Public Broadcasting Act of 1967, the government made the support of public telecommunications a necessary public policy -- one that has been reinforced for 22 years by the Congress.

The Public Broadcasting Act of 1967 declared that "it furthers the general welfare" to encourage public broadcasting "which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications service for all citizens of the nation..."

The vitality of public television's future depends not only on secure funding sources, but on the wisdom of the Congress, the administration, the Federal Communications Commission and the courts in guaranteeing for the American people continued access to noncommercial, educational programming services. Public television offers a means for ensuring that the foundations of knowledge and understanding necessary to a democratic society are available to all citizens, not just those who are able to pay.

Public Television Exemplifies Local Service and Involvement. Today, public broadcasting is the only locally-controlled service among the communications media of the United States whose sole purpose is to produce and distribute programs designed to serve the public and educational interests, rather than commercial interests. Television increasingly has become viewed only as a business — and most of the television in America today is big business. Distinct from commercial and cable television, however, public television's objective is to satisfy viewers needs, impart knowledge and understanding, and open doors to the vast range of our cultural diversity — not to deliver advertisements to audiences. Public television stations are nonprofit, educational, public service institutions with their roots in the community, dedicated to the community's service.[1]

A typical example of community service is in northern California where three public television stations in partnership with 64 county offices of education and 600 school districts, provide instructional services to 70,000 teachers and 1.5 million students. In addition to instructional programs for the classroom, the stations provide support materials, program schedules, training workshops for teachers, curriculum specialists and staff developers. The delivery of this important service to classrooms is, in many instances, dependent on local cable operators decision to place and maintain the public television services on their schedule.

Public Access to a Tax Supported Service. The American viewing public has a right of access to the public television services for which their tax dollars pay. It is critical that Congress take steps to ensure public television's access through all distribution technologies, whether cable, broadband school and home delivery by

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[1] The appended "Local Public Television Services for Minorities and Special Audiences *A Special Report* details unique local programming targeted to minorities and other special audiences.

telephone companies or common carriers, direct broadcast satellites, or other technologies not yet available. Without appropriate federal action, public television may fall short of the Congressional goal of assuring nationwide availability of public television service to every American.

**Must Carry Requirements Will Preserve Public Access to America's Sole Source of Local Noncommercial Public Television Service**

Public television stations provide the only noncommercial service available to all households regardless of their ability to purchase cable services. While cable penetration has increased substantially over the past few years, the availability of most services is less than one-half that of public television's. For example Arts & Entertainment's penetration is 44 percent, Discovery's is 49 percent and CNN is 57 percent. In contrast, public television reaches 98 percent of the nation's households.

Cable services may offer some programs that resemble some of public television's offerings, but they do not have public television's educational purpose and commitment to local service. Public television has pursued a dedication to lifelong learning in school, in the workplace and at home on a scale that has established it as an important educational institution in every community it serves and in the nation at large. Today, public television's instructional programming services are available to 29 million students and 1.5 million teachers in classrooms across the country.

Public television also reaches out to the large number of adults to whom reading, writing and education are lost opportunities of their childhood, by

providing the formal instruction they need and lack. The PBS Adult Learning Service (ALS) offers college credit television courses through local partnerships of public television stations and colleges. Since 1981 more than 1,500 colleges in cooperation with 300 public television stations have enrolled over one million students in ALS distributed courses.

Public television has a proud history of producing television programs addressing social, educational and community concerns. They address these issues not as a broadcaster, but as a community institution that can engage the local public in local solutions to the issues. The Public Television Outreach Alliance develops community outreach programs each year that involve citizens and community organizations in key social issues – programs such as *The Chemical People*, which resulted in the establishment of 10,000 local task forces, 8,000 of which still exist to deal with drug abuse; *Who Will Care for the Children?* on childcare; and Project Literacy US (PLUS), the successful ongoing national literacy initiative. Stations across the country have also involved local educators, community organizations and concerned citizens in projects that are directed to the large numbers of youth at risk.

Next year, public television will focus on seemingly intractable global environmental problems as an outreach theme. Local stations, with a host of environmental and service partners, will work together to encourage viewers to understand environmental problems and propose local solutions. Our efforts will include 35 hours of primetime programs, three college level telecourses, a series for junior and senior high schools, live teleconferences with industry and government agencies, and a host of materials for local community groups.

**Harm to the Public Interest in the Absence of Must Carry Requirements**

Cable operators' actions in dropping and shifting stations since the repeal of must carry rules demonstrate the losses possible without "must carry" protection. The FCC, the National Cable Television Association and NAPTS have conducted surveys during 1989 in an attempt to identify the impact of drops and shifts on broadcast stations.[2]

Loss of Educational Services. Cable carriage decisions have resulted in the loss of valuable educational services. Each instance of a cable system's termination of carriage of a local public television station causes harm, not only to the schools and cable subscribers, but also, because of viewer and revenue loss to the public television station dropped, to all of the other viewers of the public station.

Teachers expecting classroom television services for their students, paid for with scarce public education dollars, are not likely to want to substitute cable program services for their curriculum. Students beyond the confines of the classroom also rely on carriage of public television stations for their continuing education.

For example, the state of Virginia contracts with WNVT in northern Virginia, to provide instructional television for school use. One cable company dropped the station from its carriage, resulting in a loss of instructional television service in 14 schools within its coverage area. Pressure from the schools themselves convinced the cable operator to restore WNVT's signal.

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[2] A copy of the joint comments of the National Association of Public Television Stations and the Public Broadcasting Service in the Matter of Inquiry into the Availability of Broadcast Television Signals on Cable Television Systems, MM Docket No. 88-138, July 1988, is appended to this testimony.

Another example involves: KCSM-TV, Channel 60 in San Mateo, California which is licensed to the San Mateo County Community College District. KCSM was reportedly dropped by at least five cable systems within its Grade B contour, principally during 1986. According to KCSM, the most devastating of these drops was by Viacom Cable in San Francisco, serving 106,000 subscribers. Although Viacom Cable carries other public television stations, San Francisco cable households were deprived of KCSM's unique mix of programming.

KCSM offers college level telecourses, and claims to offer more telecourses than any other station in the country. Without warning, Viacom dropped KCSM from its San Francisco cable system during the August enrollment period in the summer of 1986. As a result, KCSM estimates that the students desiring to pay tuition and enroll in its courses were unable to do so. In addition, vastly more people watch the credit courses without enrolling, and these people were deprived of this educational enrichment.

Public Television Services May Not Meet Cable's Financial Criteria For Carriage. NAPTS believes that analyzing the programming decision-making criteria of cable operators is likely to be a far better indicator of future behavior than the few drops and shifts in the regulated or "about-to-be regulated" market. The major factor cable operators consider in deciding which channels to carry is their ability to generate revenue. For example, United Cable and Brown, Bortz and Coddington have produced an econometric model for evaluating cable systems and their optimal channel use which systematically estimates a programming service's revenue contribution to the cable system. Public television services are unlikely to rate high on implicit or explicit criteria in this sort of decisionmaking.

The fact that cable operators must meet their financial objectives also suggests carriage and positioning decisions will be designed to benefit cable owned services. The FCC data confirmed that dropped or shifted stations are replaced, in most cases, by a programming service exclusive to cable, generally a so-called cable network. This tendency for cable operators to replace broadcast stations with cable services, many of which provide revenue for cable systems and their owners, underscores the importance of public television's position that an analysis of cable operators' program decision-making criteria is a critical factor in trying to predict their future behavior. Such an analysis reveals that those criteria are not likely to favor carriage of local public television stations.

There is already evidence that cable operators will structure their program delivery system to benefit cable program services. For example, a year ago TCI announced that it would be reducing channel capacity in certain systems, in part to raise ratings on cable services. John Sie, TCI's senior vice president for programming, admitted that TCI reduced the number of channels in a Pittsburgh system from 66 to 44 and stated "it's not at all clear that more channels are better" for TCI.

This trend is likely to become more pronounced in the years ahead. Given the economic incentives for cable systems to promote their own program services, elimination of the must carry rules may have the ironic effect of allowing cable operators to create artificially the very scarcity of distribution channels that cable technology promised to overcome.

Cable Operators Influence Access Through Channel Positioning. Cable operators also effect public television's audiences by shifting stations from one channel position to another, often without notifying the public station of the shift. Where a station has dedicated a great deal of time and effort to building station identification on a particular cable channel, any move can be devastating, even if the shift is to the (usually higher) over-the-air channel number. The FCC report cited many instances of stations being shifted.[3]

For example, in Iowa TCI decided to move Iowa Public Television's KIIN from its over-the-air Channel 12 to Channel 22 in four towns in Dubuque County. Cable carriage is particularly important to Dubuque County because of its hilly topography and the effect of that terrain on the over-the-air signal. Following Dubuque Cable TV's decision to move KIIN from Channel 12 to Channel 22, Iowa Public Television noticed that membership contributions from the area of the channel shift were down 75 percent as compared to the rest of the state. The channel shift meant that viewers needed a converter for non-cable ready sets. Even though one free converter box was provided to subscribers, many subscribers apparently did not obtain the converters, did not know how to install them, or did not acquire them for second sets in their homes.

The Likelihood of Increasing Numbers of Drops and Shifts. Public television believes that, as the must carry rules recede further into the past, cable operators will continue to drop, shift or exclude public television services at an accelerating rate. Reports of cable carriage from both the FCC and the NCTA last year provided additional documentation for the proposition that, freed from the constraints of

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[3] Ibid.

mandatory carriage, not all cable operators will choose to carry all local public television services. And, if they do carry them, they may relegate them to undesirable channel positions. Even carriage on a station's assigned channel could cause quality reception problems because of co-channel interference.

**Must Carry Regulations Can Meet Constitutional Concerns**

NAPTS believes that must carry regulations can be crafted to address the constitutional failings of the interim rules. Two separate attempts by the FCC to impose must carry requirements on cable systems have been held unconstitutional by the U.S. Court of Appeals for the District of Columbia Circuit. In both instances, the Court found that the Commission had failed to build a sufficient record to justify the must carry rules' "incidental" burden on the first amendment rights of cable systems. In each case, however, the Court invited the Commission to provide empirical evidence that demonstrated the need for must carry regulation and indicated its willingness to defer to the FCC's judgment if the agency established adequate justification for the rules.

New must carry rules may have the benefit of exactly the empirical evidence that the D.C. Circuit has called on the Commission to produce. The FCC has opened MM Docket No. 88-138 to collect statistical evidence on the number of local stations, including public broadcasting stations, which have been dropped or shifted "off-channel" in the absence of must carry rules.[4] In that proceeding, both NAPTS and the NAB have supplied the commission with figures that clearly indicate that local

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[4] Inquiry Into the Availability of Broadcast Television Signals on Cable Television Systems, MM Docket No. 88-138, 3 FCC Rcd 2698 (released May 10, 1988).

broadcast stations are suffering without "must carry" in place. The Commission collected virtually no such statistics in imposing its second set of must carry rules and merely cited abstractly to "evidence in the record" of cable drops in its 1986 Report and Order without elaboration.[5] As the Quincy decision indicates, the Court will be "extremely hesitant" to second-guess must carry rules that are tailored to address the critical issue of station drops. Thus, the earlier court decisions appear to leave open a constitutional avenue for the reimposition of must carry rules.

In both Quincy and Century, the D.C. Circuit overturned the FCC's must carry rules as unconstitutional incidental burdens on cable's first amendment rights under United States v. O'Brien.[6] Under O'Brien, government regulations that incidentally burden speech are constitutional if they "serve[ ] a substantial governmental interest and [are] no more intrusive than necessary to serve that interest."[5] We believe that the financial and policy support of public television services by local, state and federal governments — as well as public institutions — are evidence of that substantial governmental interest.

Any must carry regime that rests in part on the protection of public broadcasting can invoke more than two decades of a commitment by Congress to protect and promote the public interest through public television.[7] The Commission acknowledged the federal interest in ensuring at least minimal access to noncommercial educational television in its second "must carry" order, but declined to adopt mandatory carriage for public stations beyond the five-year

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[5] 1986 Report and Order, 61 R.R.2d at 830.

[6] Quincy Cable TV, Inc. v. FCC, 768 F.2d at 1445.

[7] See, e.g., authorities cited in note 5 supra.

transition period to A/B switches.[8] Given Congress' extensive and long-standing support for public broadcasting, NAPTS urges the protection of these interests through mandatory must carry requirements for full carriage of local public television services.

**The Interim Carriage Rules Were Inadequate to Protect the Public Interest**

The interim carriage rules only required that cable systems with the capacity for more than 54 channels carry more than one qualified public television service. As a result, access to valuable public services was jeopardized in markets supporting more than one public television service. In many markets, especially those with large and diverse populations, the local community supports more than one public television service. It is essential that any reinstated must carry requirements protect these services.

For example, the people of greater Chicago support two stations. WTTW offers the basic PBS schedule and local public interest programming. Greater Chicago also supports WYCC, which carries a full schedule of college level for-credit instruction. WYCC, in fact, is a leader in the development of television for distance learning.

In Miami, audiences support WPBT as their basic PBS service and WLRN, which broadcasts instructional programming to schools, targeted for kindergartners through high school seniors.

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[8] 1986 Report and Order, 61 R.R.2d at 826.

Besides their basic PBS station, WKPC, the citizens of Louisville support WKMJ of the Kentucky state educational network. That network is a leader in school instructional programming and the developer of programs that allow viewers to receive their GED through television courses.

Washington, D.C.'s public stations reflect the cultural diversity of our nation's capital. WETA carries the basic PBS service; WHMM, part of Howard University, serves one of the nation's largest minority communities; and WNVC programs for many populations, such as the new immigrant Asian populations settling in the metropolitan area.

New Orleans supports a second service, WLAE, whose programs serve the special needs of the poor and underclass in southern Louisiana.

All of these services receive substantial private and public support from their local communities. They provide two or more unique, unduplicated services to their communities of license. Such services exemplify the use of television to enhance education and meet pressing social needs. Yet carriage of these services clearly was jeopardized by the interim must carry rules which required the majority of cable systems to carry only one public television service. To achieve the necessary level of protection, the reinstated rules should specify required carriage of all public television services supported by the local community.

**Mandatory Carriage Is Needed to Ensure Noncommercial Public Television Service in a Commercial Environment**

Public television believes there are sound public policy reasons to assure the public's unimpeded access to the public television services that Congress has promoted and protected and which it helps to fund with public monies.

Freed from the commercial imperative to maximize viewer ratings, public television's mission is to educate, enlighten, inform and entertain; to provide programs that serve the needs of those who, for the most part, are not adequately served by commercial broadcast and cable television. These audiences include children, the elderly, the handicapped and ethnic and racial minorities; they also include every citizen who needs an opportunity to understand national concerns from a local perspective. Cable operators, on the other hand, are generally interested in offering a program line-up with the greatest revenue potential. Given these differing motivations, there exists a substantial risk that many public television stations will not be carried by their local cable systems without rules requiring such carriage.

Public television stations have taken an active role in informing the cable industry of the public's needs and their concerns in meeting those needs. For the past two years, public television has taken a booth at the National Cable Television Association convention to encourage better understanding of public television's mission and local station commitment to community service. Stations also have taken part in regional and state cable association meetings. Nearly half of the public television stations have designated staff members as cable coordinators in an effort to build better relationships at the local level. NAPTS and NCTA have designated

staff liaisons who strive to identify and resolve potential problems before they reach critical proportions. NAPTS currently works with both the National Association of Broadcasters and NCTA to research new opportunities for cable and broadcasters to work together. Every attempt is being made to work together. Cooperation, however, is not sufficient to protect carriage of all local public television services.

The cable industry has changed the television environment significantly. There are many more programming choices available today than five years ago. Despite the increased variety of video options, public television viewing levels have remained firm. Public television programming remains distinctive and unique. Viewers continue to show their support for this important public service by contributing to their local stations and encouraging increased tax-based support.

The rich potential of public television's public service can be realized through a continuing national policy which ensures that Americans have access to a medium whose goals are public service, education and enlightenment. We appreciate the interest and commitment of the Congress in providing valuable public television services to the nation. We hope that your interest in cable television's impact on our industry will lead to a greater understanding of the substantial governmental and public interest in guaranteeing audiences continued access to those services.

Senator INOUYE. Thank you very much, gentlemen.

As you can see, we have 11 members of the committee here present with us, and that should indicate to one and all that this matter is a matter of great importance.

Mr. Effros made a rather simple but important charge that I think all of us should respond to. What makes the local broadcaster so unique that he is entitled to this special treatment? Or, put another way, what national interest is served by providing this legislation for local broadcasters?

Mr. FRITTS. Mr. Chairman, the Communications Act of 1934 specifically requires broadcasters to serve their local communities. It charges the responsibility for the oversight of that to the Federal Communications Commission.

The problem, of course, is that if we are charged to serve our local communities—and I would submit to you that most stations across this country serve their communities in an exemplary fashion because they can do well by doing good in their local communities—and they do innumerable amounts of public service, public affairs, news, et cetera, and we could go on about that.

The problem is that you have charged the FCC with mandating that those communities receive this service. The technology has changed to the extent that the cable operator sits in control over which channels pass through the system to 56 percent of the people in the United States today. I would submit to you that that number will increase substantially in the years to come.

I think as we look ahead, not just back, that we have to extrapolate some of the numbers that have occurred in the cable industry and the growth that they have enjoyed and remind ourselves that the real issue is access to the public.

If a broadcaster cannot be viewed by the people in his community, it is very difficult if not impossible for him to continue serving the community in an exemplary manner.

Mr. PADDEN. I would just add to that. I think there are actually three separate prongs of the legal basis that you can rely on in adopting this kind of legislation. The first is communications policy.

The broadcasters have a unique obligation to serve their community as Mr. Fritts has outlined, but that is not the only policy basis. You could also base it on antitrust principles. We clearly have a monopoly bottleneck problem here.

Attached to my testimony is an affidavit of a woman who lives in New York City right off of Central Park. There must be 20 grade B signals that pass over her apartment building, but because cable service is available, the people that run the building no longer maintain the master antenna system on her building and, as she says in her affidavit, she has no choice. If she wants to watch TV, she has to subscribe to cable, and she even took some pictures of what kind of reception she gets if she puts her set up on the window sill and points the antenna out towards Central Park so she will be able to see. She is absolutely dependent on that cable.

And the third basis for adopting this kind of legislation is the tie to the copyright provision the cable industry has. You know, ten years ago Mr. Effros and other cable witnesses came up here and, as I outlined on page 21 of my testimony, Mr. Effros says without

the local broadcasters, he says, that local cable system is going to die because if he cannot even show the local programs, he is going to lose customers to Wynguard Antenna or whoever else makes the antennas now.

I think so long as that compulsory copyright license is there, and they have an absolute government guaranteed right to take our signal, simple equity would suggest that there ought to be some obligation coming back down the other direction.

Mr. EFFROS. Mr. Chairman, I did say that ten years ago. I would say that today, and that is one of the points here.

The local cable system carries local broadcast services because in certain cases, most cases, the local broadcast service does a good job, provides services that our subscribers want to see, and we are in business to give our subscribers what they want to see. And it is for that reason that most local broadcasters today without legislation, without FCC requirements are carried by local cable systems.

We have offered contractual arrangements to local broadcasters in terms of cable carriage. We have talked about Syndex. Indeed, in Mr. Fritts' testimony it made it sound like it was terrible that the cable systems were talking about a tradeoff for syndicated exclusivity and carriage contractual agreements that would guarantee them carriage.

That happens to be a proposal that was made by the FCC, which the cable industry was following up on. But, let us go back to your principal question.

If any type of legislation is going to succeed, that says a given First Amendment speaker is better than, more important than other First Amendment speakers. You are going to hear from Bob Johnson of Black Entertainment Television or The Discovery Channel or C-Span or the numerous other diverse sources of video programming that cable now has to it.

There has to be some basis. Can we really point to public service announcements, as Mr. Fritts did, and say well, that is the reason that local broadcasters have to be carried, and they are the First Amendment specialist?

Well, it is very curious about public service announcements. You know, every time I look at a football game, I see the thing on the bottom of the ad for the U.S. Army that says paid for by the U.S. Army. Suddenly, it is no longer a public service announcement. It has to be paid for.

I hear about Hugo and San Francisco, the earthquake. And, to be sure, broadcasters did a great job. So did cable, by the way. CNN was the one that got the information to Germany in that case so that the governor of the State could find out what was going on.

But, let us be real. It was not television that people were watching in San Francisco. They could not. They did not have electricity. They were listening to radio.

It is very important to remember that when we talk about these great things that broadcasting is doing, broadcasting is simply another delivery mechanism primarily of entertainment programming, certainly of news as well, and it is important, but does it reach the level of saying that we are going to throw off other First Amendment speakers in favor of this First Amendment speaker, particularly when this one First Amendment speaker has a unique

thing that nobody else has, and that is the spectrum which he gets for free from the government. And, therefore, that lady can stick her antenna out the window and get the signal without the cable.

We have one medium in this country of video delivery that is unique in that it gets a free distribution system, and it is received by 100 percent of the people, that they want to make sure those transmitters can reach, and now that same medium wants another advantage. It is fascinating to listen to, and before we get too far afield on how great the public service is of broadcasters, let us remember that the network pays the local network affiliate to get distribution. It is not the other way around.

We hear all these great statements now of gee, maybe we ought to charge the cable operator for our programming. Have we been cross-subsidizing him or her? Wait. He who got that license, that magic license from the Federal Government says to the network which is bringing in all sorts of news and information programming oh, no, I am not going to let you be seen in this community unless you pay me. And then they try to go to the cable operator that is taking their signal and delivering it to the places where they acknowledge they cannot get it to because either they have not put up multiple antennas or they have not spent the amount of money needed for transmitters, and they say now, we want you to pay us to deliver the signal.

That is an incredible process we are going through here. How is that going to get through court? What is the special need of the public that would survive First Amendment challenge?

Senator INOUYE. Mr. Mooney, do you have anything to add?

Mr. MOONEY. You know, I am here trying to make up with the broadcasters.

I do not want to fight with them.

But if you would allow me, I would just like to make, in the hope of continuing to make it up with these guys, a couple of comments on Mr. Padden's chart.

I think one of the things those charts showed is that in the instances he described, overwhelmingly the pattern is that the cable operators are carrying these high-numbered UHF stations down on the low-numbered VHF band, and if the cable operators were as venal or wicked as is sometimes suggested, that would not be the case, because in the absence of a rule they would have kicked them all upstairs.

But second, I do not want to be characterized as coming here and recommending to you that you make a law that says if the broadcaster is happy where he is located and the cable operator is happy where the broadcaster is located, the law nonetheless says you cannot do that and they have to put them some place else.

I think the law should always allow for broadcast stations to be positioned wherever they are by mutual agreement and all I am really talking about here is what happens in the event of a dispute, and in that instance I think you have got a hard time holding up a channel position by law that is anything other than what the FCC gave them off air. That is my only point.

Senator INOUYE. Anyone else? Mr. Brugger.

Mr. BRUGGER. Your question originally was, what is the public interest served here, and I think that is where public broadcasting comes in. It does serve the public interest.

It is serving the mandates of this committee and the U.S. Congress, certainly the mandates of its State government and its local schools, and certainly the communities that are supporting its services. We are serving 29 million schoolchildren in K through 12 on a weekly basis.

We have over a million adults now who are taking college courses at home through their TV set getting credit through local colleges, and certainly to me that is a substantial government interest.

Senator INOUYE. Thank you very much. Senator Gore.

Senator GORE. Thank you very much, Mr. Chairman.

I was listening to you, Mr. Effros and you are a very able advocate. You can state the issue a little bit differently, though, because under current Federal law the Congress prevents the only natural competitor to the cable industry from competing. The Congress prevents the local franchising authority from regulating. The Congress requires the largest source of your programming to give it to you for next to nothing, and as a practical matter, when people hook up to the cable they do not think in terms of going to the back of the TV set, fiddling around with the wires, and removing the cable and then hooking the antenna back up just in order to change from one channel to another.

So as a practical matter, when a cable company gets majority coverage in a given area, that cable becomes the gateway for the video services involved and broadcasters that used to deliver their services over the air then become dependent upon the fairness of the cable distributor for their economic livelihood.

You mentioned in your earlier statements that Long Island was an excellent example of cable companies delivering quality news services to the citizens of their area.

I am informed that Channel 50 in Suffolk County, Long Island, provides an outstanding local news program competing with the New York City news that comes from a lot of the VHF broadcasters, but that as the cable penetration grew on Long Island they found that people were not watching them any more, or a certain number of them.

So they went, hat in hand, to get on the cable system, and the cable system, as it turned out, had its own news service for Long Island run by Charles Dolan, Channel 12, and the cable company, I am told—and I am going to ask you to comment on this, Mr. Padden—told the Channel 50 that they would not be able to get on the cable system unless they eliminated their local news program, because it would then compete with the cable company's local news program. They did not want competition, and so they kept the station off until they would agree not to compete.

Now, Mr. Padden, have I stated the facts of that situation wrong? Do you have any knowledge of this?

Mr. PADDEN. I have heard the same story, and I have also heard that as a part of the continuing negotiation the station has recently reduced its news coverage in an effort to appear as less of a threat to the cable system and get on.

Exactly the same thing happened in Kingston, New York. I have got a news story quoting the cable operator there as saying they put on this little UHF station that had a local news, if they would stop doing their local news.

Senator GORE. Exactly the same thing happened on a grand scale when the most profitable broadcasting network tried to put a news channel on cable television and was told that they would not be able to do it because the multisystem operators have a financial stake in their ownership of CNN and—I mean, the spectacle of NBC getting down on its knees and begging the multisystem operators to let them on cable systems around the country and then agreeing to eliminate competition in the news distribution service for national news, it is the same thing that has happened here.

Now, Mr. Effros, do you want to comment on this?

Mr. EFFROS. Yes. Mr. Gore, just to, I believe—I am not going to engage in speculation as to what a given letter said, but it is my understanding that the situation on Long Island that you are referring to referred to an attempt by a station to get carriage not in its local area, and therefore the "must-carry" rules would not apply to it in the first place. They were trying to extend their region to an area that their broadcast station did not get to, so we are talking about a totally different issue as far as national issues are concerned.

If we want to get into that, although I thought we were talking about "must carry" here, it is an editor's decision when you make—you look at your breakout of what you are offering to the public and you say well, "The New York Times" decides, or "The Washington Post" decides that we do not need the fifth columnist of the same type.

We would like to offer diversity. Indeed, despite the statements made this morning that the 1984 Cable Act was designed to help a poor, struggling industry, that is simply not true. It is a farce. It was never stated that way.

What the 1984 Cable Act was was an attempt to assure that we would get diversity, an attempt to increase on that diversity, and cable has increased that diversity. It would not increase the diversity if we decided to have all the same programs.

Senator GORE. Is it not true that NBC was told by the cable industry that it would have to give up its plans to offer news and competition to CNN and change it into something else, and it is now a business news?

Mr. EFFROS. You would have to ask NBC that, sir.

Senator GORE. Well, you have been very outspoken on all these other issues.

Mr. EFFROS. But I am talking in terms of local, "must-carry" issues, and we are talking about local service and local news. I would have to point out to you that—I assume when you started your statement you were talking about preventing competition from the most logical competitor, and I assume, as we have had discussions on this before, that you are talking about satellite distribution.

Senator GORE. No. Actually, I was talking about the telephone industry in that connection, but we can talk about satellites too, because the cable industry has brutally crushed the satellite niche

industry and ordered programmers to scramble even when they were relying on advertising revenue.

Mr. EFFROS. If we are going to talk about satellite distribution, I would have to point out that that eliminates local carriage altogether. You just articulately stated why the AB switch, according to some—I do not agree, but why it would not work.

But if satellite carriage is the primary carriage of information to the Nation's television sets, then these two gentlemen, apparently, according to you, have a great deal more to worry about than they do now.

Senator GORE. So you are doing them a service by crushing the satellite industry?

Mr. EFFROS. No. We carry local broadcasters, sir. We carry them, by and large, to a majority—a vast majority—of our subscribers and I dare say we will continue to, and we also agree with you, if you like, to put in a "must-carry" rule.

We are not opposing the imposition of a "must-carry" rule. We are not opposing the carriage—if you want to say we must carry public broadcasting, go ahead.

The question before us, as I understood it when I received the letter to testify this morning was, after you have made that decision, how do you make it legal? That is a much tougher question than the rhetoric that we are all having fun with this morning.

Senator GORE. Let me say, Mr. Chairman, that we have many members here, and so I am going to limit my comments to just two other brief comments.

With respect to the special service provided by broadcasters, I think—and I will say this to you especially, Mr. Fritts—that your case is strengthened here when you can come and point to the public interest services that you provide in your communities, and there are many.

Your case would be even stronger if, in the dialog that your industry has with this committee, you were able to point to things like childrens television and say yes, we believe children are part of the audience and we are providing a public service there, too.

So as the balance of power in this industry is debated, I would submit to you that broadcasters have ever larger and more important reasons to live up to the spirit and not just the fine print of the public interest agreements, but that having been said, let me point to these recent disasters, and you glossed over the San Francisco thing by pointing to radio, Mr. Effros.

Let us look at what happened in Charleston. WCSC-TV in Charleston, then run by a person named Harold Crum, immediately went on the air when the hurricane approached, remained on the air 24 hours a day for nine days, without any commercials whatsoever. Complete public interest, devoted to the citizens of that community. No way to calculate the revenue loss during that period.

The cable system in that area is still not back up and running. So there are times when broadcasters are called upon to play a special role, and the philosophy of localism is one which the FCC and the Congress has encouraged for good reason.

Yes, the industry is changing, and yes, these rules and the balance has to be reviewed, no question about that, and there are ar-

guments on both sides of this issue. This is one that has to be approached very carefully, I agree with that.

But we cannot overlook the vertical integration in the cable industry, the awesome economic power now being wielded throughout the entertainment and communications industry by cable.

Mr. Chairman, thank you very much.

Senator INOUYE. Thank you. Senator Danforth?

Senator DANFORTH. Thank you, Mr. Chairman. There are so many people, and so many panelists, that I will do you the service of not asking questions.

Senator INOUYE. Thank you, sir. Senator Gorton.

Senator GORTON. Mr. Padden, I followed your argument all the way to the point at which you demand by law that whatever channel UHF station is being carried on by cable now, it has a perpetual right to.

It is one thing, it seems to me, to say that a station should be carried on a channel on which it comes off of the air, or a lower channel. Obviously, you cannot carry Channel 50 on Channel 50 if the cable system has only 40 channels, but you can try again.

It seems to me awfully difficult to justify the proposition that because Channel 50 is now being received on Channel 7, for the next 100 years that cannot be changed.

Mr. PADDEN. Well, I would respond this way, Senator. You have in your materials this little chart that shows the vertical integration in Rochester, and what we face is, all of these little boxes are program services that the guy who owns the only pipe in town, the only transmission conduit, he has equity interest in all of these program services, and we would frame the issue as follows: should we be removed from the channel position we have historically occupied just so that he can feather the nest of one of his own program services here?

If you think I am exaggerating, we have in our testimony, as I have said before, the transcript of a letter that a cable operator sent to advertisers saying—well, I will read it to you. He is not making these changes to respond to some consumer demand.

Senator GORTON. No. He is making them to make a profit, but in this case, why should he not?

Mr. PADDEN. Because I think he has to either decide that he is going to be the only monopoly conduit in town and accept some traffic regulations limiting his conduct of operating that system, or, if their position is that their First Amendment rights are such that we cannot have traffic rules to protect the rights of nonvertically integrated programmers, then I think they have just invited this Committee to put the telephone company and anybody else into direct competition with them.

It seems to me they cannot have it both ways, and while I understand the unfairness of our position, as you have phrased it, I think if you look at our position as a nonvertically integrated programmer trying to hold its own on this cable system, I do not know any other way, other than to grandfather people where they have been—and I would note that the concept of grandfathering is not one that is unfamiliar to this body.

Senator GORTON. Mr. Fritts, is that NAB's position as well?

Mr. FRITTS. Senator Gorton, there are serious problems with the channel positioning issue. I would like to refer to Mr. Padden's example of the woman who put her husband through med school. It was good enough then. It seems to make sense—we deal in logic here—then why not leave it as it is?

We would suggest at the very least that some type of grandfathering or moratorium be imposed which certainly is not a burden on the cable systems today and should not be in the future.

Senator GORTON. Mr. Mooney, is it on this issue or on the broader issue of positioning in general that your negotiations on must carry with the broadcasters have broken down?

Mr. MOONEY. It is specifically on the issue of what the law should say with respect to channel positioning. We have offered on several occasions to agree to recommend to the committee that in the event of a dispute, the broadcaster will have a legal right to be on his FCC assigned off-air channel number, no matter what the cable operator thinks, but a different position is being taken by the broadcasting industry where, as you characterize it, if Channel 50 is on Channel 7, Channel 51 has a legal right to stay there forever.

I have to tell you that this is not a burning issue amongst the cable operator community because most operators who have realigned channels have finished doing so and have no interest in doing so with any frequency again. It is a legally significant point, however.

One of the things we are trying to do here is not only to get a must carry rule back, but one which will withstand judicial scrutiny and, you know, this cart has fallen off the bridge twice already, and I think to make it carry any more freight than it absolutely has to would be really imprudent.

And, in addition to that, I make the point again about cable programmers. You know, they are having to swallow pretty hard to accept must carry for broadcast stations, and to ask them to go further than that and concede that the broadcaster should also have a legal right to preferential channel positions I think is more than they can take.

Mr. EFFROS. One legal point there, Senator, and that is that if you start talking about grandfathering and things of that nature on channel positioning—and I agree with Jim on this—again, we are happy to try to design a must carry rule, but channel positioning, if you talk about grandfathering and remember that broadcast stations are basically bought and sold and changed all the time and you grandfather a station, as Mr. Gore just pointed out, that was excellent, did great local service and so on, three weeks later it is bought by—and I am just going to use one name—it could be anybody—by a shopping network which now owns ten or twelve channels of their own.

And all of a sudden, we have a shopping network that the government somehow has said simply because there is this license, simply because that license can be bought and sold very easily, it gets preferential First Amendment treatment. I do not think it is going to fly in court. We do not want this thing to fall off the bridge a third time. We are tired of being up here testifying on must carry.

We want to carry the local signals in the main, and we will whether there is legislation or not. But if you add channel positioning to the package, I just do not see legally how it flies.

Mr. FRITTS. Mr. Chairman, I might just comment on that, if I may.

My friend, Mr. Effros, spins a pretty good yarn, and I think we all enjoy them. But rather than us as a panel sit here and try to tell you what is constitutional, I think that we would defer to some constitutional scholars to help us craft legislation that might move this issue forward.

Senator GORTON. Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Exon.

Senator EXON. Mr. Chairman, thank you very much.

Mr. Mooney, how many cable television companies are there in the greater metropolitan area of Washington, D.C.?

Mr. MOONEY. I would guess 15, 16.

Senator EXON. 15 cable?

Mr. MOONEY. 15 or 16, probably, within this ADI as they are referred to in the television world.

Senator EXON. Mr. Fritts, how many commercial broadcasting stations, approximately, are there in the greater metropolitan area of Washington, D.C., commercial stations and other stations such as public television stations?

Mr. FRITTS. I do not have the exact number, but I think if you are talking about this ADI, which includes Baltimore, probably in the neighborhood of 15 to 18.

Senator EXON. That is very interesting. I did not know what the numbers were, but there are about the same number of broadcasting facilities as there are cable television programming.

Therein lies a question that I would like to ask you, Mr. Mooney, as to why. Could we solve this must carry problem? Could we solve the right of the people to get what they want to get and have some choice?

If we could have some kind of an arrangement where a subscriber to a cable television service, like this Senator in Bethesda, Maryland, where I look up and down those 68 or 9 channels that I have there, and half of them, at least, are channels that I wish I did not have. They provide me nothing that I am interested in.

It may be that they provide some service that other people are interested in, and I salute cable. I could not get along without cable because you deliver an awful lot of baseball, football, all those kinds of things in my house that I like. You also deliver some things that I do not like. The shopping service. I do not want to buy beads and trinkets.

But I guess I am narrow in my approach. Could not we solve some of this problem by giving Jim Exon the choice of what cable programming I wanted to subscribe?

There is a monopoly in my home today with one cable coming into that home. I think that is a pretty scary monopoly the way things are going. Would it be possible or has your industry, Mr. Mooney, ever considered the possibility of transferring signals back and forth so that if Jim Exon did not get the type of service that he wanted from the cable company that he now has, that he could pay

the same fee, but order his cable company to give him one of the other 15 signals of other cable franchisers in the area?

Mr. MOONEY. Most of the cable systems in the area are pretty close to state-of-the-art systems with large channel capacities, and they are all carrying pretty much the same channel lineup.

As an economic matter, it is difficult to sell most—it would be difficult or if not impossible to sell most of the basic services on a strictly a la carte basis, not only for technological reasons having to do with the architecture of the plant, but also because networks—like Discovery, which is all documentary, Nickelodeon, C-Span, could not stand up economically on an individual basis, and can only stand up, in fact, if they are sold as part of a package to everybody.

At the risk of letting the cat out of the bag, I should say that there is a technological solution to your problem where, as I understand it, there are only so many things you are interested in. You do not want to have to travel through all those other channels to get to the ones you like.

I have got a Panasonic TV set that comes with a remote control that you can program to circulate through only preselected channels. So, you know, suppose you were on a 54-channel cable system and there were only eight channels that you were interested in, you could get one of these things and program it for the eight you like, and go right through.

Senator EXON. Mr. Mooney, that is not the thrust of my question. The thrust of my question was that if there are 15 cable systems in the greater area of Washington, D.C., I am sure that it would be technically possible for the cable television system that I subscribe to provide me with the signals of any of the programming of the other 14 cable systems in the area. Therefore, I would select, any one of the program services availabile on the 15 other cable systems. And if I did not like the channel that I have now—and I suspect that there are cable systems in this area that would provide me more and better program services than what I get now—is it possible that we could have some kind of arrangement where the cable franchise would allow me some selection of the different options that I might be offered by another cable system that is doing a better job and providing me with the stations and the programs that I like to see? Is that possible?

That would blow apart the monopoly. I recognize that. But is that technically feasible?

Mr. MOONEY. As a technical matter, there is not at present an interconnect between the Washington, D.C., area cable systems. There is no physical connection between them, so you could not transfer signals from one to the other without bouncing them off a satellite first.

And I guess I was not making myself clear in my primary answer to your question. For the most part, aside from the locally originated programming, the local government access programming, for example, you will find the same program services being carried on all of these cable systems.

So, unless you are in an unusual one, I do not think there is much on one other one that isn't on yours.

Senator EXON. Oh, yes, there is, Mr. Mooney. Yes, there is. I would very much like to see the Chicago Cubs baseball, and I cannot get it on my television or my cable. It is available, and that is just one example. It may be an extremely narrow example, but there are others.

And if you were saying that all of this programming is essentially the same, then I am not sure that is accurate. In other words, if we have some arrangement where I can select the cable company services I want to come in the monopoly line into my home, then there might be enough competition around that maybe the monopoly franchise would have to provide other services, like, WGN Chicago, if there was enough demand by their customers.

Mr. MOONEY. You have, of course, picked the signal with which I am probably weakest on as far as my response goes. It is only carried by four cable systems in the D.C.-Maryland suburbs, although I conjecture that that probably has something to do with the fact that the copyright fees for stuff has gone way up in recent years. And many cable operators regard the importation of that kind of distanct signal as nearly financially prohibitive these days.

Senator EXON. Well, I will not belabor the point anymore, Mr. Chairman. I just simply want to say that there is a monopoly. From the beginning, I was strongly in support of the cable companies, and I think they have played a key role.

I see complications with this system that we have today, and I guess that what I think we have to do here is to remember that we are not here representing the cable companies or the broadcasting companies. We are here representing the people who watch those facilities, and I think we should ensure the widest possible choice to the viewing public. That is what I am interested in, and at least I am making my point, again, that maybe the cable companies to avoid from this charge of vertical integration could make more cable signals or programming available to me and other subscribers than they do now because under the present system, my cable television facility cable puts into my home what they choose whether I want to see it or not. I would like a broader choice.

Mr. MOONEY. Senator, your point is well taken. I am going to follow up on this, and I should tell you that this is not the first time in a congressional hearing I have encountered a Chicago Cubs fan.

Senator EXON. I am a St. Louis Cardinal fan.

Senator INOUYE. Senator Ford.

Senator FORD. Mr. Chairman, I will not ask any questions and save you some time. I have heard a great deal since I have been here about First Amendment rights, and then we find that when technology gets to a point that I can live in the hills and hollows of east Kentucky and receive the same television that my city cousins receive in Lexington and Louisville and other places because they have cable. Then I find that after I have expended funds to receive all of these programs that others are able to receive, I am cut off. I see that as the elimination of my First Amendment rights because I had the ability or the desire to purchase some equipment that would bring that programming into my living room.

I think that under those circumstances that we are going to have to look long and hard because if Senator Exon wants to get the

Cubs game with a dish, he could get the Cubs game and would not have to worry about paying $60 a month here in the metropolitan area to get the basic channels, to get into ESPN or some of the other programs that might carry that baseball game.

But, for that amount of money just to get the sports program, he in all probability could get the Cubs game most every night when they play. So, there is something about that that disturbs me also. And, as you know, I have been somewhat of a partner with Senator Gore as we have tried to arrive at some kind of solution.

And so, my First Amendment rights become more expensive all the time. If that is the First Amendment, and that has been purported here, as I have listened very closely, and I would hope that somehow that if I wanted to I could live in an area where I could not receive cable without you all squishing me after I have already purchased a $3,000 antenna and started paying for it over a period of months, which is a struggle for me, but it brings to my living room and to my family those things that I would like to see.

And I hope at some point we can work out an agreement or something that would stand the test of the courts to give my people an opportunity to receive those things that we have here in the urban areas at probably not much more in cost. If a network is transmitting, I think they could scramble.

As it relates to filming at a local station, I think if you have on a special type that is wholly owned, that you could scramble that, but at least give us an opportunity to look at the independents. There are a lot of times I do not care about the programs you show. I agree with him. There are some that I would not want my grandchildren to watch, and I can turn those off. And you say that is easy to do.

But when you go from station to station, they are basically the same. I sure do like to have an opportunity to get over to the independents and watch a program. As with historical value of things they put on, I have an opportunity to see that. I want to see that, and I want my children and grandchildren to see that also and give them an opportunity to understand history as they watch it up there on the tube.

Right now in order to get them something to watch, I almost have to go get the video and stick a tape in and let them watch that, and it becomes more than a rental. You have to purchase a film in order to get it. And so, I think there are a lot of problems out there as to the consumer and their desires, and their rights, and I intend to follow this very closely and do the best I can.

Mr. Mooney, you have always beat me, and I admire your strength and lobbying ability, but down in west Kentucky we have an old saying that a mule will live a lifetime to kick you.

Mr. MOONEY. Senator, if I might comment just very briefly. I find it extremely painful to have to be in disagreement with you and Senator Gore.

Senator FORD. It has not bothered you very much up till now.

Mr. MOONEY. I would just say that, with respect to what is going on here, I think most of the conflict you have heard is about why there should be a must-carry rule. And you know the bad news is probably that it will be—the day will probably never come when everybody at this table can agree why there should be a rule.

The good news is that in order to get a compromise, I do not think we have to agree on the why. And I think everybody is here saying that, with respect to the basic proposition, you can get everybody here to march together.

Senator GORE. Mr. Chairman, if I could make a brief comment on what Senator Ford has said; I thought it was a very important statement.

I used to consider myself as an ally of the cable industry when I was on the Telecommunications Subcommittee in the House and helped to play a key role in passing the pole attachment legislation, for example. But what Senator Ford said about the experience of our constituents in the satellite television controversy really should be underscored. Because that really opened my eyes to what increasing economic power can do.

Because the cable industry has been ruthless, brutal, monopolistic, and just incredible in its efforts to destroy that industry. And you know, this question could be resolved by agreements that embody goodwill on all sides.

I listen differently when broadcasters and independent broadcasters and public broadcasters come here and say we cannot deal with the cable people. They are too powerful, they are too arrogant, they are trying to take advantage of us. You see, after what happened to the satellite TV people, I listened to them very carefully. I believe what they have to say and what the Hollywood programmers are saying.

They tell us that since the 1984 act, no prime time programming has been able to get on cable television systems without being shaken down for a piece of the action. There has to be ownership participation on the part of the cable operators, the large multisystem operators, before they will let a new prime time program on the air. It is a shakedown.

Now, the Hollywood people, the independent broadcasters, the public broadcasters, the network affiliates are all telling the same story. And against the backdrop of what happened with the satellite television industry, and what is still happening to the satellite television dish owners, I think that we have got to listen very carefully.

And I hope, along with the Chairman, this can be worked out between the participants satisfactorily. But what I am hearing convinces me there has to be some guarantees that the public interest will be satisfied here.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much, Senator Gore.

I am certain all of you are aware that I have found myself on the other side on this issue of satellites. But I would hope that all of you will take to heart the statement just made by Senator Gore. His sentiments are increasingly being supported by members of the United States Senate.

I think all of you agree that the question of why, as Mr. Mooney has put forward, has been resolved. The question now before us is how can we carry this out in a constitutional manner? Can we draft some measure that will pass the constitutional test?

Accordingly, the staff will be communicating rather heavily with your staffs to come forth with something that would pass this constitutional muster.

I have just one question. Assuming that this proposal is constitutional, what if we to grandfather all of the stations on their present channel positions and call upon the FCC to come forth with a proposal within; say, a given a period, a year or two years, to resolve this issue of positioning?

Mr. MOONEY. I think, for our side, given the nature of the thing, we would prefer to have it settled here. But if it was the will of the committee and the desire of the committee that it be handled in the way that you have just described, we would live with that, we would go along with that.

Senator INOUYE. We can do this, but we thought that since this matter of positioning is so important that it should be given the widest time for consideration, giving all stations an opportunity to appear before the FCC, such as necessary. Because we we do not have the staff to listen to all sides of the story, much as we would like to.

Do you think you can buy a proposition like that, to temporarily grandfather this to give the FCC time to come forth with a proposal to handle this issue?

Mr. PADDEN. First, let me say that I am extremely appreciative that you would offer a suggestion like that. I am on my way this afternoon, as it happens, to a meeting of our board of directors scheduled tomorrow in Tucson, and I will get back to you within 24 hours. I will put that to them, and I would hope that within 24 hours I would be able to get back to you with a positive response. And I certainly appreciate you putting forward a suggestion that is as helpful as that, Mr. Chairman.

Mr. FRITTS. I would also concur, Mr. Chairman. That is very generous and farsighted of you to look down the road toward trying to help us resolve this issue. And I also will be glad to present this proposal, at least in its broad form, to our directors, who obviously make the decision on these issues.

Mr. BRUGGER. I agree. I think it is good to have a court of last resort. And the FCC, I think, would be a good court for that.

Mr. FRITTS. Mr. Chairman, could I make one comment, please, to acknowledge Senator Gore's admonishment on children's television? And I think that, in some quarters, it has not been recognized that broadcasters, quite frankly, do a fine job in children's television. I know that you are aware that we are willing to work with you to try to strike an accord so that we can move forward from where we are.

But I just make one comment that on the evening of November 8, at the Library of Congress, the Congressional Families for a Drug Free Youth will be joining with the broadcasters in saluting that good work through our Service to Children's Television Awards here on the Hill. I think all of you have received invitations. I hope you will join us for that, because I think it will be a very good experience, in terms of what broadcasters, in fact, are doing for the youth of our country.

Senator INOUYE. Thank you all very, very much. It has been an interesting panel. I hope something will come out of this. We would hate to be back again 10 years from now as Mr. Effros has stated.

So now may I call upon the next panel, consisting of the President of the Community Broadcasters Association, Mr. John Kompas; the President of Black Entertainment Television, Mr. Robert L. Johnson; the President of the Cable Access Legal Action Council, Mr. Paul F. Crouch; and the Executive Vice President of the Association of National Advertisers, Mr. Daniel L. Jaffe.

I should like to point out to the second panel, with the apologies of the committee, that the departure of members of the committee is in no way indicative of their lack of interest in this panel. It just happens that they are right now in the midst of certain budget problems. And coincidentally, most of them belong to the budget committees and the appropriations committees.

We are trying to figure out some way to pass the continuing resolution to extend the budget. We have certain disasters that require additional funds. And then we have Gramm-Rudman over us at all times.

I thank you all for coming. We very deliberately put you up as the second panel so you could listen to the first panel, and to comment if you so wish. Because, in many ways, the decision will be made by members of the first panel.

We have received your prepared statements and I can assure you that your statement will be made part of the record.

I have also indicated, on the inquiry by Mr. Fritts, that the record will be kept open for three weeks to provide all of you an opportunity to make addenda or supplemental statements or corrections and such. And obviously we are concerned with the constitutional question, so this will require further discussion.

With that, may I now call upon Mr. John Kompas.

## STATEMENT OF JOHN KOMPAS, PRESIDENT, COMMUNITY BROADCASTERS ASSOCIATION

Mr. KOMPAS. Thank you, Mr. Chairman.

It is a pleasure to be able to present the LPTV side of the story to this committee. This is the first time that LPTV or community television has had a forum in public. You will hear what is happening to some very unique stations throughout the country.

As stated, my name is John Kompas; I am the President of the Community Broadcasters Association. Community broadcasters are those LPTV stations that specialize in local programming in their communities. We take great pride holding up a mirror to our communities to give them exactly the kind of local programming that the majority have not ever had before.

We are talking about many unserved as well as underserved communities.

If I may give you a couple of examples, Senator. In Worland, Wyoming, which is a community of about 10,000 people located in northern Wyoming, up in the Great Basin area, they have no over-the-air television reception available to them. Cable in that community is in excess of 90 percent of the penetration.

We had a local resident operator receive a construction permit from the FCC to build a station, and he approached the cable operator for assurances of cable carriage if indeed he was to go ahead and build this station. The word from the cable operator, which in this case is a TCI affiliate, said that there would be no problem, that they would be open to having local programming in Worland, which has never had local programming before.

Our citizen proceeded to go to the bank and get a note to cover the building of the station, built the station, started operating for 45 days presenting programming from the local high school, programming from the community, from the chamber of commerce. At the end of 45 days, he went back to the cable operator and the cable operator said, I am sorry, Denver decided that you cannot have a channel here.

That particular operator is now out of business, Senator.

Worland no longer has local programming.

We have the same case happening in Paducah, Kentucky, where a television station has been providing local programming for two years, trying to get on cable for all that period of time. They lost. That station has now gone to a passive translator service. They have stopped the local programming, and they have had to discharge their staffs.

Senator INOUYE. Did the contract permit Denver to rescind the contract?

Mr. KOMPAS. Senator, we are in a situation where LPTV stations are considered second-class to full-power stations, so therefore, we were never included in the must carry, and we are never even considered to be in consideration for that kind of carriage.

Senator INOUYE. But before going to the bank, did the LPTV in Wyoming have a written contract with the local operator?

Mr. KOMPAS. No, it was verbal in this particular case.

Senator INOUYE. Verbal?

Mr. KOMPAS. Yes. It is a community of 10,000 people, and there, a person's word is pretty well trusted by another person.

Senator INOUYE. I was told in Wyoming a handshake is a bond.

Mr. KOMPAS. That is what it was until Denver came along. Just so you do not believe that these are only smaller communities that are being affected, we have an LPTV community broadcaster in Milwaukee who is presenting business programming during the day and Hispanic programming during the evening.

This LP operator was so aggressive as to go to the Milwaukee Election Commission to get a voting machine brought to the studio so that they could explain how to use it in Spanish to their audience. In this case, Warner Cable System deemed that this was not in the best interest of the community and has not offered cable carriage to this particular community broadcaster in deference to Univision, which is what they carry on that system.

Channel 8, another station in Milwaukee, after paying for cable carriage for two years, 10 cents per subscriber per month, received a one week notice and they were off the cable system.

Again, a loss of local programming, a loss of local staff jobs—ten positions in that case were eliminated—and the station is now doing home shopping.

In California, we have a situation where we have a potential community operator who is trying to get on three different cable systems. He cannot even get two of them to return his calls. The third one said, we will talk, but the conversation starts at $75,000 per year. That's an astronomical amount of money for an LP operator to even try to come up with early.

The stories continue to go on. In Sarasota, Florida, and in Olean, New York, we have similar cases, but with just a little bit different twist to it. There we have operating LPTV stations, community broadcasters who are doing local programming and selling local ad time to the merchants in these communities—which, by the way, is the first time that many of those merchants have had the ability to purchase local advertising on television.

They are being denied cable carriage because the cable operator is saying, I am sorry, we sell commercial time here on CNN, ESPN, et cetera. We do not need the competition. We do not have to put you on. Go away.

I wish I could say that problems we are having in the community television industry are just relevant to commercial broadcasters, but they are not. We have many instances of public broadcast stations, locally originating public broadcast stations, who are having tremendous problems with TCI, specifically in the west.

For example, in White Sulphur Springs, Montana, there is a public broadcaster who does local programming and is supported only by a television tax district. The cable operator, in turn, aggressively markets waivers to that television tax district in order to cripple the funding that is available for the LP operator to use.

In Elko, Nevada, we have a situation where a PBS operator doing local programming has been pleading with the cable operator for over two years for local carriage. This is a station that is supported by the community and programmed by the community. In this particular case, after two years the cable operator finally agreed to give carriage. I am afraid to announce that the station may not make it though. It may already be too late. The financial picture is getting pretty dim over there.

The service that these community stations are providing is intensely local, and is often the only local service available to small community audiences. This is the local service that is the bedrock of the American broadcasting system. It is a travesty to let cable operators snuff it out because of corporate policies or fear of competition.

Congress can help to resolve these problems, Senator, and enable this new local service to flourish. Local government authorities should not be denied authority to address the programming needs of their communities in the cable franchising process.

It is not necessary to abandon all Federal control of cable carriage, but local governments should be able to insist that local stations in their own communities be carried. Legislation under consideration dealing with cable carriage should not ignore community broadcasting, as it does now.

Community broadcasting is left out of most bills, such as S. 905. We were excluded because they incorporate by reference the FCC's old cable carriage rules developed prior to the advent of community television. We have prepared and are now offering language to

both Senator Lieberman and Congressman Shea so that they could include this kind of correction in their bills, and we are hopeful that that will happen.

I am fully aware of the high level of negotiations between the NAB and the NCTA attempting to reach a consensus on cable carriage. CBA does not pretend to have the resources to match the heavy and expensive lobbying efforts of those organizations, and I know what would happen if I advocated displacing any conventional stations from cable, but if the Congress is going to protect the public interest in local programming service, then at a minimum, any new legislation should not discriminate against community broadcasters or place their stations at an artificial disadvantage in competing with the cable industry.

For an example, if a cable system is required to devote a certain percentage of its capacity to "must-carry" broadcast signals, it should get as much credit for carrying a local community station as it does for carrying a conventional TV station, and if all local stations must be carried, the local community station should be included in that mix.

If the cable system is in a capacity situation where it is saturated, the operators should feel free to choose between community and conventional TV in the way it feels best meets the needs of its audience for diverse programming, and if a cable system is required to sell carriage to conventional TV stations at a reasonable rate, a community station should have the right to the same carriage at the same price.

Pressure must be brought on the large MSOs not to have blanket anti-LPTV community policies that ignore the determinations of their own managers as to what best meets the local community needs.

Thank you for the opportunity to address you, Senator.

[The statement follows:]

**TESTIMONY OF JOHN G. KOMPAS**

Senator Inouye, and Members of the Committee, thank you for inviting me to testify this morning on behalf of the Community Broadcasters Association, the trade association of the low power television industry. I am John Kompas, President of the CBA. I am also President of Kompas/Biel & Associates, which publishes the LPTV Report, the monthly magazine of the LPTV industry.

The LPTV industry is the most rapidly growing segment of the broadcast industry, with an average of 17 new stations signing on the air each month. While our stations operate with only a fraction of the power of conventional TV stations, many are providing community based local television programming for the first time to small cities and specialty markets in larger cities that are too small to support much more expensive conventional TV stations. We call them "community television" stations.

LPTV was created when Congress suggested the service to the FCC in 1979. The first construction permit was granted in 1981. The adoption of LPTV rules by the FCC attracted some 40,000 applications. Thanks to a $10 million special appropriation by Congress in 1983, the FCC was able to process this avalanche of applications and implement a lottery system to award construction permits. Some 450 LPTV stations are now on the air in the 48 continental United States, with some 250 more serving Alaska.

LPTV stations have never had any legal right to cable carriage, even on a system on the same street where their transmitter is located. Some community stations have been successful in persuading cable systems that both parties benefit from cable distribution of a new local programming source. Of those that are carried, some are carried for free, some pay cash for carriage, and some share revenue or cross-promotions with cable operators.

Unfortunately, many stations have run into serious roadblocks to obtaining cable carriage, especially in the case of large MSOs, some of which seem to have unreasonable and absolute policies against LPTV carriage regardless of the merit of community television programming and the lack of any alternative local service.

I am submitting for the record correspondence and newspaper articles that demonstrate the kinds of problems LPTV stations are having:

Lee Hollingsworth established the first local television service in Worland, Wyoming, a town which could never sustain a conventional TV station. He made arrangements with the manager of the local cable system for carriage and spent money to build in reliance on a commitment to carry his station. The manager was overruled by TCI, owner of the cable system, and Mr. Hollingsworth was denied access to the primary delivery system to some 90% of the homes in his service area. His station failed, and Worland lost its local programming.

Channel 8 in my home town of Milwaukee provides an advertising outlet for small businesses which cannot afford conventional television advertising rates. After three years of paying 10 cents per subscriber per month for carriage, Channel 8 was dropped from the Warner Cable system. The City of Milwaukee wanted to help but was powerless to control the cable system because of the Cable Act of 1984. LPTV Channel 65 in Milwaukee brought a voting machine into the studio and explained on the air in Spanish how to use it, but it cannot get on the cable because it could not afford to pay Warner's price, if the cable system would accept it at all.

TV54 in Paducah, Kentucky, abandoned local programming, discharged its staff, and became a passive translator, because it could not get on the cable. City officials were again powerless to help.

TV24 in Sarasota, Florida, was promised carriage by a Storer cable system. The promise was broken, and the LPTV station has brought suit against the cable operator.

TV20 in Olean, New York, reports that it has to pay Warner Cable for carriage in its community but has not been able to get on the Warner system in Bradford, where a survey of viewers asked to have the station. Warner sells local advertising against TV 20. Other cable systems in the area which do not sell local advertising have welcomed TV20 on their systems.

A cable system serving Woonsocket, Rhode Island and neighboring communities has refused to carry a community station which is Woonsocket's only local TV service, even though the system has 52-channel capacity.

Two stations serving minority audiences in Indianapolis have been unable to obtain carriage commitments from two area cable systems.

One community broadcaster reported that when he attempted to buy time on a mandatory public access channel, he was told that the price for an LPTV operator would be much higher than the price for anyone else, because the cable company did not like LPTV.

These are only a few stories. Many community broadcasters tell me that they are afraid to speak publicly, lest they harden the negative attitude of their local cable system. But I have drawn two conclusions from my talks with people throughout the LPTV industry. One is that the principal problem with cable carriage lies with MSO's, many of whose corporate officials have blanket policies against carriage of LPTV stations regardless of the merit of their programming and will not permit local managers to decide what would best serve each community. The second is that cable operators are afraid of the competition from community broadcasting to their local advertising sales and are often determined to do what they can to cause community stations to fail.

The service that these community stations is providing is intensely local and is often the only local service available to small community audiences. I am attaching for the record copies of feature articles from the LPTV Report on several stations. I think you will be surprised at what is going on. This is the local service that is the bedrock of the American broadcasting system. It is a travesty to let cable operators snuff it out because of corporate policies or fear of competition.

Congress can help resolve these problems and enable new local services to flourish:

(1) Local governmental authorities should not be denied authority to address the programming needs of their communities in the cable franchising process. It is not necessary to abandon all federal control of cable carriage, but local governments should be able to insist that local stations in their own communities be carried.

(2) Legislation under consideration dealing with cable carriage should not ignore community broadcasting, as it does now. Community broadcasting is left out because most bills, such as S.905, incorporate by reference the FCC's old cable carriage rules, developed prior to the advent of LPTV. I am fully aware of high level negotiations between the NAB and the NCTA attempting to reach a consensus on cable carriage. CBA does not pretend to have the resources to match the heavy and expensive lobbying efforts those organizations can mount, and I know what would happen if I

advocated displacing any conventional stations from cable. But if the Congress is going to protect the public interest in local programming service, then at a minimum, any new legislation should not discriminate against community broadcasters or place their stations at an artificial disadvantage in competing for cable capacity.

For example, if a cable system is required to devote a certain percentage of its capacity to must carry broadcast signals, it should get as much credit for carrying a community station, if it chooses to do so, as for carrying a conventional TV station. And if all local stations must be carried, local community stations should be included. If the system's capacity is saturated, the operator should be free to choose between community and conventional TV in the way it feels best meets the needs of its audience for diverse programming. And if a cable system is required to sell carriage to conventional TV stations at a reasonable rate, a community station should have the right to carriage at the same price.

(3) Pressure must be brought on large MSOs not to have blanket anti-LPTV policies and not to ignore the determinations of their own managers as to what best meets local community needs.

Thank you for the opportunity to tell you about community broadcasting. We are building a new industry -- the first really new broadcast service in the United States in several decades -- and we are very excited about it.

Senator INOUYE. When the Committee was made aware of the unique problems of the LPTV operators, we decided to put you on the panel here. How many LPTV operators are there in the United States?

Mr. KOMPAS. There are currently about 726 operators in the United States. There are 250 educational operators in Alaska alone, and about 450, approximately, in the continental U.S.

Senator INOUYE. Are they all in the rural regions of the United States?

Mr. KOMPAS. No. The split seems to be along the lines of about 60/40, 60 percent going to the rural areas and 40 percent coming to the urban areas. When we are in the urban area, we have a tendency to seek out a demographic that is large enough to support the station and then give very specific service to that demographic.

Senator INOUYE. The staff has advised me that there is a unique problem involved because of the power wattage, but we are now in the process of discussing this matter with the Cable Television Association to see if some solution can be reached, but I can assure you that your problem is being very carefully considered as we draft this measure.

Mr. KOMPAS. Thank you, Senator.

Senator INOUYE. May I now call upon the President of the Black Entertainment Television, Mr. Robert L. Johnson?

## STATEMENT OF ROBERT L. JOHNSON, PRESIDENT, BLACK ENTERTAINMENT TELEVISION

Mr. JOHNSON. Thank you, Mr. Chairman. I am delighted that I had a chance to come here earlier to hear the earlier panel. And it strikes me that a deal has been cut, and I feel a little bit of deja vu in the sense that as a minority company, we are often asked to play by the rules, be competitive, get in the free marketplace, but when you do that and the original group goes up the Hill to cut a deal, we are never at the table.

And I feel that Black Entertainment Television has not been at the table in the discussion on a must carry rule. And I can say that if a must carry rule is to be crafted, it would have to pass a constitutional test to such an extent that we would not be treated as second class citizens which I feel we would be if this particular effort the broadcasters and the cable operators are trying to put forward is enacted.

It is simply unfair for Black Entertainment Television, the nation's only black service providing programming to some 26 million black households around the country, be denied a chance to compete effectively with the broadcaster who is given free use of the spectrum space, to a public TV station who is subsidized by Federal tax dollars, and we compete openly in the marketplace without one nickel of subsidy from the Federal Government, from the State government or any other government institution.

Yet, by this particular must-carry bill, we would be mandated a second class citizen in terms of carriage. And, Senator, it is simply not fair.

All we are asking in our efforts if there is going to be a must-carry bill, that the must-carry legislation treat us like any other First Amendment speaker.

Simply put, a cable operator can choose whichever service he wants to carry, be it a cable programmer or a broadcaster, but the right should go to the cable operator to make that decision. It should not be mandated by the Federal Government. That to me is a level playing field. That to me is equity. That is all we are asking. We are not asking to be given any position in a head of a broadcaster or a head of a public television station, but we are only asking to be treated fairly.

The Federal Communications Commission, the Congress of the United States has continually mandated that there be efforts to improve opportunities for minorities in ownership, opportunities for minorities in providing program diversity, and we have done that. We provide 24 hours of programming that simply would not exist if we were not available over cable systems.

Yet, at the same time, while we fulfilled the FCC and the congressional effort at diversity, we are denied the only means we have of reaching our viewers, carriage on cable systems.

We started in this business about 10 years ago, Senator, as the same time that ESPN started and WTBS and USA. We are at 25 million homes. These other services are at 41, 50 million homes.

When you translate that into nickels per subscriber, that is a significant amount of money that we lose that would enable us to provide better programs to our subscribers simply because we are not carried on cable systems.

It is often said that we are the 26th channel on a 25-channel cable system. The operators simply tell us for lack of channel capacity, you would be in my market. We are not carried in Manhattan Cable, which serves the uptown area of Harlem, one of the largest concentrations of minorities in this country because the system has to carry duplicate, off-air network stations.

And our position is that the courts have looked at this and have said it is not fair. We look at it and say it is not fair and honestly, Senator, we would be compelled to undertake a test in the courts to see if it is fair because we believe that the Federal Government should not mandate a preference for broadcast speakers.

They certainly should not mandate it when it goes contrary to their policy on diversity of ownership and minority ownership.

Black Entertainment Television has done more to increase diversity than any FCC policy that exists, and we have done it without one dollar of Federal subsidy. And I submit that the only fair thing for the Congress to do is to say to Mr. Mooney and Mr. Fritts and Mr. Padden, if you are going to carve out legislation, be sure you take into account the interests of all speakers.

And that is our position, and that is what we are appealing to this committee for. I have some tremendous testimony my people prepared, but I decided I wanted to go with emotion, and that is because that is how I feel about it. Thank you, sir.

[The statement follows:]

STATEMENT OF ROBERT L. JOHNSON, PRESIDENT, BLACK ENTERTAINMENT TELEVISION, INC.

Mr. Chairman and members of the committee my name is Robert L. Johnson, and I am president and founder of Black Entertainment Television [BET], the Nation's first and only cable network providing entertainment, sports and public affairs programming targeted specifically to the viewing interests of black cable households. Thank you for this opportunity to appear before the committee and comment on the possible reinstatement of the must carry rules.

BET is vehemently opposed to any must carry rules or channel repositioning legislation, for that matter, which would favor broadcasters over cable programming services. During the earlier proceedings concerning must carry before the FCC and the D.C. Circuit, BET participated vigorously to make clear its opposition to rules which we felt were anticompetitive and unconstitutional. Fortunately, the D.C. Circuit agreed with our analysis. BET continues to believe that only the total elimination of the must carry rules will create a level playing field for cable programmers and broacasters.

The broadcasters, however, seem determined to ignore the findings of the D.C. Circuit and, with the help of Congress, reinstitute new must carry rules. I am here today to (1) request that this committee resist all attempts to reinstitute the must carry rules and (2) present an alternative proposal for your consideration if a new must carry regime is unavoidable.

BET's proposal is for this committee to include in any legislation implementing a new must carry regime the option for cable operators to meet their must carry obligations by carrying stations which serve the local needs and interests of the community or stations which provide minority programming. Thus, a cable operator would select his must carry signals from a pool of services including local over-the-air signals and minority oriented programming services (whether broadcast or cable).

Such a revised must carry regime would accomplish a threefold purpose:

First, the inclusion of minority non-broadcast programming in the pool of must carry signals would help avoid a first amendment challenge that BET would be compelled to undertake if there is legislation which favors broadcast speakers over non-broadcast speakers;

Second, the inclusion of programming from diverse sources would promote the diversity of programming goals of the Communications Act and the first amendment as outlined by the Commission in its 1978 policy statement on minority ownership; and,

Third, the inclusion of minority programmers in the pool of mandatory channels would further the Commission's minority ownership goals.

In light of the weak basis for the previous must carry rules, a strengthening of the rationale for these rules would help the rules withstand the scrutiny of the courts. Rules fashioned in this way would also serve the public interest by promoting diversity in programming.

While evaluating this proposal, it is important that the committee understand the tremendous negative impact that the must carry rules have had on the growth of BET's subscriber base. BET, the Nation's only black oriented cable network was founded in 1979. Today BET serves a total of approximately 25 million subscribers. Other programming services started around the same time 10 years ago serve subscriber bases which are nearly double the size of BET's. For example, USA network serves 47 million subscribers, TBS serves 49 million and ESPN serves 51 million subscribers. This disparity was caused in large part by the previous must carry rules.

Lack of channel capacity is the reason most often given by cable operators for not carrying BET. If you will, BET is the 26th channel on a 25 channel cable system. If cable systems were not required to carry numerous and duplicate must carry signals, BET would have a better chance to obtain carriage. Indeed, in the Manhattan Cable System, a system which serves the black population in Harlem, BET is only carried parttime due to limited channel capacity. Because BET received 5 cents per subscriber for its service and advertising revenues are based on the size of our subscriber base, this is a critical dollar and cents issue for BET.

The incredible part of BET's predicament is that this Government mandated constraint on BET's growth direclty contradicts the longstanding policy of the FCC and Congress regarding minority ownership. In 1978, the Commission made it clear that minority ownership of broadcast properties furthers a substantial governmental interest in encouraging minority viewpoints in the media. The Commission concluded that minority ownership of broadcast properties was the best way to encourage diverse views. Thus, the Commission established minority ownership policies such as

tax certificates, distress sales, and a "qualified enhancement" for minority ownership in broadcast licensing.

In its 1982 policy statement of minority ownership of cable television facilities, the Commission expanded the policy to encourage minority ownership of cable systems and to insure that the viewpoints of minorities were represented in cable television programming. Yet, BET the Nation's only black programming service distributing such diverse views is denied access to cable systems due to an antiquated and anticompetitive must carry regime.

As you see, BET is in a no win situation. We offer exactly the type of diverse programming the Commission and Congress envisioned in there attempts to provide an alternative voice for the American public. Indeed, BET has provided this programming without any assistance, financial, or otherwise, from the Commission or Congress. As a cable programming service, BET does not benefit from the minority ownership policies established by the Commission. Yet, we have been denied access to many cable systems due to a preference given to broadcasters by the must carry rules. Why should broadcasters who receive free use of the spectrum and public television stations who receive Federal subsidies and tax benefits, be given a greater opportunity to succeed that BET, a service that has made its way in the free marketplace without any governmental assistance whatsoever.

If Congress intends to reinstitute the must carry rules, I see no reason why BET's proposal could not be made a part of that legislation. This proposal would allow Congress to continue to encourage local programming as well as minority programming on cable systems. The goal of localism should not outweigh two equally important goals—program diversity and minority ownership. BET is only accessible to its viewers by means of cable channels. Broadcasters, on the other hand, have an alternative means of reaching viewers—by over the air signals. BET should not be treated as a second class citizen when it comes to carriage on cable systems, our only means of distribution.

Cable subscribers should not be deprived of the diverse programming which BET supplies. On no other channel can cable subscribers find a national news show focusing on issues of concern to black people; a daily call-in talk show featuring topics and guests of interest to black people; and weekly shows about problems and issues facing the black youth of today. BET programs almost 24 four hours a day of programming designed to inform, challenge and entertain the minority population as well as non-minority viewers. As the Commission stated in its 1978 policy statement on minority ownership: "Adequate representation of minority viewpoints in programming serves not only the needs and interests of the minority community but also enriches and educates the non-minority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the first amendment."

Despite the Commission's efforts, the number of black-owned television stations is very small. BET is often the only source of black television programming available in the majority of markets. This committee should not implement a new regime which would artifically limit the number of channels available for nonbroadcast programmers in general, and minority programmers in particular.

Furthermore, these same broadcasters should not be entitled to a preference when it comes to the positioning of their broadcast services on cable systems' channels. Broadcasters should not be entitled to pick and choose the channels on which their service is carried by cable operators. Again, it seems ludicrous to us that broadcasters would have any greater rights to placement on a cable system than a cable programming service. The inherent inequities in any channel repositioning proposal should govern this committee's consideration of any such proposal.

In sum, minority programmers such as BET should be included in the pool of must carry channels available for carriage on cable channels. Only in this way will BET be able to compete fairly for carriage on cable systems.

**Senator INOUYE. I can assure you, Mr. Johnson, that if we are to come forth with this legislation, it will not be one that would relegate you to any second- or third-class citizenship status. And to further assure you, may I suggest that you and your staff and your counsel get together with my staff here to look over language that would make certain that the LPTV people and black television operators are given a fair shake.**

**Mr. JOHNSON. Thank you, sir.**

Senator INOUYE. I am now pleased to call upon the President of the Cable Access Legal Action Council, Mr. Paul Crouch.

**STATEMENT OF PAUL F. CROUCH, PRESIDENT, CABLE ACCESS LEGAL ACTION COUNCIL, SANTA ANA, CA**

Mr. CROUCH. Mr. Chairman, we sincerely thank you for holding these hearings. This is our first entry into such a forum, and we feel that it is long overdue because we represent hundreds of smaller independent, mostly UHF TV stations that have been impacted and hurt the most by the loss of the must carry rule.

My name is Paul Crouch, and I have been a TV station owner now for 15 years. My organization, Trinity Broadcasting Network, now owns and operates 12 full power TV stations as well as in excess of 70 low and medium power TV stations.

I am also the President of Cable Access Legal Action Council, and it is in that capacity that I speak to you today.

CALAC was formed to try to bring relief to the hundreds of independent and specialty TV stations that have been denied carriage or dropped by cable systems or been repositioned to less desirable channel positions.

I understand from the 1988 FCC study that there are at least 800 stations that have been seriously impacted by the deletion of carriage by cable systems. CALAC has been working as an advocacy group for these independent, free television stations harmed by cable's decisions.

Pending negotiations by industry representatives have been ongoing for two years and have done nothing to help these independent stations to regain cable access. I sincerely hope that members of this committee will personally take responsibility to bring about a rapid solution to this problem.

It has been almost two years since the Century decision which has allowed cable to run roughshod over small, free televisions stations like the ones CALAC is trying to help. We need some relief now. Your hearings should help in finding a quick solution to these problems, but I hope you do not stop here but will move quickly on passing legislation on must carry early next year.

Cable, as we have heard today, has become a gigantic monopoly. When cable comes in, it is a fact that TV home antenna comes down. Cable then becomes, as we have also heard, the information gatekeeper, and this is not fair.

Cable systems have anywhere from 24 up to 102 channels. I have only one channel in my community with half of that community wired for cable, if I am denied cable carriage, my potential viewership is then cut in half. So, now I have one half of one channel compared to the average cable system's 36 channels. Is this fair? Is this a level playing field?

In many communities including the one where I live covenants and restrictions do not allow outdoor rooftop antennas. I personally get a very poor, fuzzy, snowy picture in my own home. If I wanted good reception, I would have to subscribe to cable. But, my home channel, 40, has been denied carriage on my community cable system.

This means I, as the president of 12 television stations, cannot even get my own hometown TV station in my own house. I think this is outrageous.

Another problem is the increasing cost of cable. Many of my viewers cannot afford cable, which means they have to rely on free television. So, it is the lower income viewers who are losing the most free television.

It is the American way to let the marketplace decide. Unpopular stations will not survive if they are not watched. They will not be able to sell air time or get donations. But how can they pass this litmus test if denied access to 50 percent of their potential audience by being denied cable carriage.

Under FCC rules, TV stations are required to ascertain their communities' needs and problems if they are to meet their license renewal expectancy every five years. How in heaven's name can we do this and provide the responsive programming required when denied access to an average of 50 percent of our stations' potential viewers in an average community?

Gentlemen, free TV is not threatened. It is dying. In some places it is comatose even right now and ready to be buried.

I hold in my hand approximately 500 of the 800 free television stations that have been denied cable carriage, removed from cable, repositioned on the dial or forced to pay cable for continued carriage, and contrary to Mr. Mooney's testimony, our group of stations has been dropped without notice in many cases by many of the cable systems.

The question is very simple. Well, let me say this first. Trinity Broadcasting, the group that I am president of, has survived only because we have paid dearly for access to cable. Generally, 25 cents per subscriber per year. Trinity is now forced to pay about $1 million a year just to maintain what remains of its former must-carry access to cable.

The question is simple. Do we want free over-the-air service to survive in America or do we want to foster the monopoly cable now has that grows stronger every day.

By the way, while other segments of the broadcast industry argue over channel positioning, many of our CALAC members will settle for any channel, even the high channels known as cable Siberia.

I hope legislation can be passed immediately to reinstate the FCC's traditional must-carry rules but, most important, do not delay action on this issue any longer. Two years is long enough; 800-plus over the air, free TV stations need legislative relief now. We thank you for hearing our urgent plea today.

[The statement follows:]

STATEMENT OF DR. PAUL F. CROUCH, CABLE ACCESS LEGAL ACTION COUNCIL

I. INTRODUCTION TO THE CABLE ACCESS LEGAL ACTION COUNCIL

Chairman Inouye, and distinguished committee members, I appreciate this opportunity to address you today on behalf of the Cable Access Legal Action Council [CALAC] on the matters of cable television, and the need for "must-carry" to preserve independent free television service in the United States. CALAC is an advocacy organization working for over 800 free television stations throughout the country which have been denied cable carriage, removed from cable systems, been assigned

to different, less desirable cable channels, or are now paying cable for carriage. Free television was mortally wounded in the District of Columbia Circuit Court's twin decision in *Quincy Cable TV, Inc.* v. *FCC*, and *Century Communications Corp.* v. *FCC*,[1] and only Congress can act to save free television.

### II. THE TIME FOR CONGRESSIONAL ACTION IS NOW

Since 1987, when the *Century* case was decided, representatives from the cable and television industries have unsuccessfully attempted to reach a compromise on the must-carry issue. Over that period of time the health of independent free television has rapidly declined. Significant numbers of free television stations have been forced to cease operations or reduce service to the public during the last two years. The time has therefore come for Congress to act on behalf of the public good. Must-carry legislation needs to be passed quickly since further delay will only result in a greater number of stations being forced out of business.

In the absence of legislative fiat there is no likelihood that any compromise needed between cable and television representatives will solve the problem. When a compromise was reached between industry representatives in 1986, following a year of debate after the *Quincy* case, the new FCC regulations were immediately challenged in court. The resultant decision reached in the *Century* case once again skewed the marketplace in cable's favor. This matter has remained as such for the last two years, and only Congress can correct this inequity.

### III. THE MUST-CARRY RULES PRIOR TO QUINCY

Prior to the court's ruling in *Quincy* FCC regulations for over 25 years had required cable systems to carry all television stations licensed to communities within 35 miles of the cable system. These must-carry regulations survived several vigorous challenges, and the Supreme Court had even affirmed the FCC's authority to regulate cable television systems for purposes "reasonably ancillary" to the FCC's regulatory responsibilities toward broadcast television, including "must-carry." [2] This justificiation in the public interest is even stronger today since the marketplace totally favors cable.

Since the *Quincy* and *Century* cases were decided the FCC conducted a survey which shows that nearly 800 free television stations have been denied cable carriage, removed from cable, repositioned on the dial, or forced to pay cable for continued carriage. In my own case, the Trinity Broadcasting Network's KTBN-TV, in Santa Ana, California, has been removed from the cable system serving my home community, and the community which the FCC requires KTBN-TV to serve (and failure by a television licensee to serve its local community could result in a loss of its five-year renewal license). These actions by cable operators have not only economically harmed KTBN-TV, but free television generally, and they have effectively denied them access to the public they are licensed and required to serve.

### IV. CABLE IS A MONOPOLY

A. *Cable has no competition.*—The demise of the must-carry rules has given cable operators the unlimited authority to choose the information which local viewers shall receive. Unlike free over-the-air television, this unlimited authority is largely unregulated by the Federal Government and, since the Cable Communications Policy Act of 1984,[3] cable is subject to only the least intrusive State or local regulation. Nor are the cable operators subject to regulation by market forces since the compulsory copyright license [4] ensures that cable systems receive a majority of their product (programming) at a price set artificially low by government action, and whose only real potential competitors, in terms of capital assets and existing communications infrastructure, the telephone companies, are barred from competition.

B. *Cable functions as gatekeeper.*—The demise of the must-carry rules, in conjunction with the Cable Communications Policy Act of 1984, the compulsory copyright license, and the prohibition of effective competition by banning telephone companies from the cable television industry, has allowed a federally and locally unregulated

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[1] 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986); and *Century Communications Corp.* v. *FCC*, —F. 2d—, 64 R.R. 2d 113 (D.C. Cir. 1987), respectively.

[2] *U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *U.S.* v. *Midwest Video Corp.*, 406 U.S. 649 *rehearing denied*, 409 U.S. 898 (1972); and *FCC* v. *Midwest Video Corp.*, 571 F. 2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

[3] 47 U.S.C. § 521-29.

[4] 17 U.S.C. § 111.

monopolist to function as a gatekeeper, deciding which free television stations have access to the communities they are obligated to serve. As stated by FCC Commissioner James H. Quello in his January 16, 1988 speech before the Alabama Broadcasters Association, no "monopoly or semimonopoly transmission pipeline should be able to prevent or obstruct the licensed stations' local service to the public."

C. *The compulsory copyright license unfairly benefits cable.*—Cable's gatekeeping power is bad enough. Incredibly, however, that power is also federally subsidized. Cable operators enjoy a significant competitive advantage over the same local free television stations whose access to the viewers it controls, since, under the 1976 Copyright Act, the cable system may carry a local station's programming free of charge, without copyright liability, programming for which the station paid competitive high prices. Cable operators may then charge cable subscribers a monthly fee for the same programming it receives free of charge. Programming costs for independent free stations are continuing to escalate further multiplying the benefit cable receives.

D. *Cable has an unfair advantage in competing for advertising revenues.*—As if these advantages were not enough, cable operators also aggressively compete with local broadcasters for the same advertising and donor dollars which support free programming available to the public on commercial and noncommercial TV stations. As Commissioner Quello noted: "[T]he potential scenario for a no 'must-carry' communications market is nothing but disaster for local broadcast service and eventually for continued free major sports events and fine quality programs."

Both Congress and the FCC do a disservice to local broadcasters and violence to common sense in attempting to legislate or regulate on the basis of a theory of market competition that does not exist. The fact that dominates the communications marketplace is that, for cable television, there is no marketplace. Cable television systems, once franchised, have no effective competition. Absent must-carry rules cable systems are monopolies with no limit on their discretion concerning the information which they choose to provide subscribers. The Cable Communications Policy Act of 1984 also effectively denies local or state authorities the traditional tool used to regulate monopolies—rate regulation.

The demise of the must-carry rules has also distorted, to the monopolist's benefit, the economic relationship between competitors for ever scarcer advertising dollars. The economics of advertising make local broadcasters and the cable systems competitors for advertising dollars, and create an economic and competitive rationale for denying local broadcasters access to the audience they are obligated to serve. Since cable subscribers must pay a monthly fee, they are, almost by definition, a more affluent market segment than that available to free over-the-air television. When a cable system is able to function as the "gatekeeper" it effectively monopolizes for itself advertising dollars aimed at more affluent demographics, leaving the system's broadcast competitor with no access to the more desirable and more saleable demographics. Prevented, or at least hindered, from competing for advertising dollars, the economic structure supporting free over-the-air television is further dangerously weakened.

## V. THE INPUT SELECTOR SWITCH IS NOT THE ANSWER

While the FCC's Post-*Quincy* must-carry rules [5] had provided for an input selector switch (the A/B switch) to permit cable subscribers to be able to switch from cable to free over-the-air television, this requirement was vigorously opposed by the cable industry. Even if the A/B switch requirement were resurrected in some manner as a supplement or substitute for must-carry, it would provide little, if any, practical relief to local broadcasters. With the up to 102 channels available on cable with superior reception, the subscriber's incentive to install an A/B switch to receive (if at all) an off-the-air signal on an indoor antenna is negligible.

## VI. RECOMMENDED ACTION

*Overview.*—On the eve of the 1990's the overwhelming competitive advantages enjoyed by cable systems, including federally mandated programming subsidies, such as the compulsory copyright, are unnecessary, uneconomic, anticompeititve and contrary to the public interest. For a local broadcaster, the cable system may telecast its programming without any cost at all. For syndicated programming provided by distant stations, the compulsory license permits cable to take and retransmit broadcast programming without express permission. A cable system need only pay the

[5] 17 U.S.C. §111.

copyright rate periodically set by order of the copyright royalty tribunal. Whatever rationales justified the copyright license, such as the need to foster an infant industry, have clearly passed away.

The cable monopoly, in the absence of any must-carry obligations, has unfair trade advantages compared to broadcast television in the acquisition of programming, in the sale of advertising, and in the limited competition it must face. These anticompetitive advantages are magnified when cable operators may act as a gatekeeper in determining which of its potential competitiors may have access to the community they are licensed to serve. Economic equity, not to mention the restoration of more level playing field in an economic marketplace, requires that at least some of the advantages cable operators enjoy must be removed. The gatekeeper, which under the current law retains many economic incentives to keep the gate closed, should be required to loosen its control of the gate.

B. *Reinstatement of traditional must-carry obligations.*—The only effective way to return fairness to the marketplace is to reinstitute the FCC's traditional (pre *Quincy*) must-carry rules. In addition, and at a minimum, the compulsory copyright license should be altered to reflect the real economic world in which cable and broadcast television compete to obtain and distribute programming.

C. *In the absence of cable must-carry, free television should not have regulatory restraints.*—If Congress is unwilling to take these actions, which the public interest fully supports, then free television should be freed from current regulatory restraints—such as the competitive renewal process—impeding its ability to survive.

Thank you for this opportunity to express the views of the Cable Access Legal Action Council.

Senator INOUYE. Thank you, Mr. Crouch. I can assure you we will try to expedite this. But, as noted earlier, we will have to pass the constitutional muster. And so that is what we are trying to do.

Mr. CROUCH. Yes, sir. I understand that.

Senator INOUYE. And now, may I call upon the Executive Vice President of the Association of National Advertisers, Mr. Daniel L. Jaffe.

## STATEMENT OF DANIEL L. JAFFE, EXECUTIVE VICE PRESIDENT, ASSOCIATION OF NATIONAL ADVERTISERS

Mr. JAFFE. Thank you, Mr. Chairman. And I appreciate you and the members of the subcommittee allowing the Association of National Advertisers to testify on this important issue.

ANA's members, as many of you know, account for almost 80 percent of all national and regional advertising in the United States.

The interest of national advertisers in relation to must carry is simple. Our members want a reasonable opportunity to reach as many American consumers as possible at the lowest cost. Our members' private interest, therefore, furthers the general public's interest in receiving commercial and other information in the most cost effective and efficient manner possible.

ANA is neither pro-broadcast nor pro-cable, rather our members are pro-competition.

ANA strongly believes must-carry rules are a crucial component of a healthy and productive national communications policy. Without must-carry requirements, there cannot be equitable competition between the networks, independent television and cable.

Let us not fool ourselves, despite all the discussion that we have heard today, the real foundation of most of the must-carry controversy is a battle between the media over revenue and, in particular, advertising dollars.

How advertisers continue to advertise on the national networks. Independent television stations and advertiser-supported cable sta-

tions will be significantly impacted by what the Congress decides to do in regard to the must-carry issue.

Cable, too often, sits in the position where it can throttle or severely hobble its competitors. If you cannot reach an audience effectively, you cannot survive as a broadcaster. If cable operators can impose economically backbreaking conditions on carriage, then broadcasters will be unable to be economically competitive.

We are pleased to hear the National Cable Television Association's and Mr. Effros' conciliatory words, but we believe the Congress needs to step in to assure a competitive marketplace.

Viewers of broadcast stations and advertisers face the reality that in the vast majority of cable communities in this country, there is only one cable operator. In the absence of must-carry requirements, cable operators in these communities will have unreasonable control over the communications pipeline, which broadcasters and advertisers must utilize to reach viewers.

Let us imagine, for the sake of example, two brothers who are competing in successful businesses directly across the street from one another. One day the government allows one of the brothers to put a gate around the other brother's business and to control the key to this gate. What will happen? Can we immediately guess which business is likely to succeed and which is likely to fail or atrophy? Should we believe the promises of the brother with control over the key, that he will not misuse this new, unlimited power?

The answers to these questions, ANA believes, are obvious. And we also believe that this example will prove to be an accurate reflection of real world conditions for broadcasters in the absence of must-carry rules.

A number of Senators today have been correct in stating that this type of control has serious implications for effective communications in our society.

For years, ANA members faced limited competitive advertising opportunities due to a constricted video marketplace. In recent years the launching and rapid growth of new independent television stations has fostered a more competitive marketplace.

ANA research has disclosed that the presence of competitive video options in the market tends to have a moderating influence on the cost of time on all local stations. Lower advertising media costs help consumers, because higher media costs often must be reflected in higher product costs.

Reasonable local cable carriage rules will assure that the continued growth of this competitive environment is not impeded. Without these rules, as cable advertising spot sales grow, and they are growing all the time, local cable operators will have an increased incentive to block out or severely burden local broadcast stations, which represent competition for these advertising revenues.

ANA also believes that if permanent must-carry rules are adopted, this will go a long way to resolving many of the nettlesome cable ownership issues now pending in Congress. If cable is required to adhere to rules that assure an equitable, competitive marketplace, who owns cable becomes less of a pressing issue.

In conclusion, reasonable, well-tailored, constitutional, and permanent broadcast signal carriage rules for cable television systems are essential for video marketplace diversity and competition.

Without must-carry rules it is certain that broadcasters, advertisers and, ultimately, consumers, will be the losers.

ANA strongly urges you to adopt permanent must-carry legislation so that a vibrant, economically competitive marketplace for the purchase of advertising time is assured.

Thank you very much.

[The statement follows:]

STATEMENT OF DANIEL JAFFEE, EXECUTIVE VICE PRESIDENT, ASSOCIATION OF NATIONAL ADVERTISERS, INC.

Mr. Chairman and Members of the Subcommittee:

The Association of National Advertisers, Inc. (A.N.A.) appreciates this opportunity to testify on the "must carry" issue. The interest of national advertisers in relation to "must carry" is simple: our members want a reasonable opportunity to reach as many American consumers as possible at the lowest cost. Our members' private interest, therefore, furthers the general public's interest in receiving commercial information in the most cost effective and efficient manner possible. A.N.A. is neither pro-broadcast nor pro-cable. Rather, our members are pro-competition. A.N.A. strongly beleives "must carry" rules are a crucial component of a healthy and productive national communications policy. Without "must carry" requirements there cannot be equitable competition between the networks, independent television and cable.

A.N.A., as many of you already are aware, represents the vast majority of national and regional advertisers in the United States. Our membership includes companies with over 2,000 subsidiaries, divisions and operating units located throughout the country. Our Members account for nearly 80% of all national and regional advertising expenditures in this Nation, a large portion of which is spent both on broadcast and cable.

Let us not fool ourselves, the real foundation of most of the "must carry" controversy is a battle between the media over revenue, and in particular advertising dollars. Any action you take on "must carry" therefore will have a major, direct impact on national advertisers and consumers.

In the past several years, advertising dollars spent on national cable and nonnetwork cable stations has risen dramatically. In 1987, $963 million was spent on cable advertising, up almost 13% in just one year. These cable advertising dollars are projected to continue to increase dramatically in the

next decade. How advertisers continue to advertise on the national networks, independent television stations and advertiser supported cable stations will be significantly impacted by what the Congress decides to do in regard to the "must carry" issue.

"Must carry" rules are necessary to ensure that cable systems do not misuse their "gate-keeper" position to exclude or economically penalize broadcast competitors, thereby undermining a healthy media environment to the detriment of advertisers and the viewing public.

Cable too often sits in a position where it can throttle or severely hobble its competitors. If you cannot reach an audience effectively, you cannot survive as a broadcaster. If cable operators can impose economically backbreaking conditions on carriage, broadcasters will be unable to be economically competitive.

As a general proposition, A.N.A. favors regulation only where necessitated by impediments to free market operations. The natural geographic monoply characteristics of cable television systems constitute such an impediment. Viewers of broadcast stations and advertisers face the reality that in the vast majority of cabled communities in the country, there is only <u>one</u> cable operator. In the absence of "must carry" requirements, cable operators in these communities will have unreasonable control over the communications pipeline which broadcasters and advertisers must utilize to reach viewers.

Let us imagine, for the sake of example, two brothers who have competing and successful businesses directly across the street from one another. One day the government allows one of the brothers to put a gate around the other brother's business and to control the key to this gate.

What will happen? Can we immediately guess which business is likely to succeed and which is likely to fail or atrophy? Should we believe the promises of the brother with control over the key that he will not misuse this new unlimited power? The answers to these questions A.N.A. believes are obvious; and we also believe that this example will prove to be an accurate reflection of real world conditions for broadcasters and cable in the absence of "must carry" rules.

Our experience in the marketplace teaches us that for a variety of practical reasons, terrain, concrete canyons, deteriorated antennas, zoning restrictions, to name just a few, a large percentage of local stations not carried on local cable systems will not be seen in cable households. A major reason many people subscribe to cable is to receive satisfactory reception of broadcast signals in their area.

Cable operators, if allowed this power over their competitors, would be remiss to their stockholders if they did not try to utilize it to their advantage. This is not an indictment of cable or cable operators, but merely a recognition of economic reality. Only the Congress can assure that the media marketplace is an appropriately competitive, and equitable one.

A.N.A. believes that Congressional failure to enact well-tailored, permanent broadcast signal carriage rules will lead to :

1) Less competition in the video marketplace;
2) Fewer information and programing options for the public;
3) Decreased effectiveness and efficiency of advertising with a resulting adverse impact on employment and the economy; and
4) Increased cost to advertisers which, eventually, will have to be passed on, directly or indirectly, to consumers.

These four concerns are related directly to the ability of cable operators without "must carry" rules to drop or severely economically burden local television stations. A.N.A. believes strongly that viewers must have reasonable access to local stations on which our advertisements are placed.

For years, A.N.A. members faced limited competitive advertising opportunities due to a constricted video marketplace. In recent years the launching and rapid growth of new independent television stations has fostered a more competitive marketplace. A.N.A. research has disclosed that the presence of competitive video options in a market tends to have a moderating influence on the cost of time on all local stations. Lower advertising media costs help consumers as higher media costs often must be reflected in higher product costs.

Reasonable local cable carriage rules will assure that the continued growth of this competitive environment is not impeded. Without these rules, as cable advertising spot sales grow, local cable operators will have an increased incentive to block out or severely burden local broadcast stations which represent competition for advertising revenues. Such anti-competitive behavior flies in the face of Congress' goal to achieve diversity in the marketplace.

A.N.A. believes if permanent "must carry" rules are adopted this also will go a long way to resolving many of the nettlesome cable "ownership" issues now pending in the Congress. If cable is required to adhere to rules that assure an equitable and competitive marketplace, who owns cable becomes less of a pressing issue.

In conclusion, reasonable, well-tailored, constitutional and permanent broadcast signal carriage rules for cable television systems are essential for video marketplace diversity and competition. Without "must carry" rules it is certain that broadcasters, advertisers and ultimately consumers will be the losers. A.N.A. strongly urges you to adopt permanent "must carry" legislation so that a vibrant, economically competitive marketplace for the purchase of advertising time is assured.

Senator INOUYE. Mr. Jaffe, what percentage of your advertising is carried by small stations?

Mr. JAFFE. I could get an approximate number, I believe, but I do not have it available today. It would have to be developed. But quite a bit is carried; there is a good deal of national spot. And in some areas it is carried on what would be called small stations.

Obviously, the preponderance of our advertising is carried by the national broadcasters and the major independents. But a very large number of dollars is carried also on small stations to fill out the advertising coverage.

Senator INOUYE. Do any of you have any suggested language that can be incorporated in our measures that would satisfy your concerns?

Mr. Crouch?

Mr. CROUCH. Mr. Chairman, I have a question.

The constitutional question has come up many times in these hearings. And I am not a lawyer, and I guess I do not understand it altogether, but how can it be constitutional for a cable system to remove one of my television stations and now deny me access or freedom of speech to a segment of my audience that I once had? I just cannot see the logic of it. It just defies all rules of fairness and comprehension to me. I just do not understand it.

Senator INOUYE. If I were a constitutional lawyer, I suppose I would have provided the solution. I am not.

Mr. JOHNSON. Senator Inouye, may I comment on that point? At one point, the cable industry was considered an extension of broadcasting. The original legislation argued that cable television was ancillary to broadcasting.

Well, that nexus was broken by a number of court rulings, which basically set cable operators free, as their own media and their own right. Now, the only thing I am advocating, and I have no competition on my point of view with the gentleman at the table, I am only suggesting that a cable operator make the decision about what programs they will carry.

If they choose to carry Trinity programming, that is absolutely fine with me, because it is based on free market. If they choose to carry Black Entertainment Television, that is fine with me, because it is based on some free market decision.

But what I am opposed to is any speaker, be it cable, be it broadcaster, having a mandated right before the other. I am willing to go out and play in the arena on the same terms as everybody else.

I am not asking for a preference for Black Entertainment Television, nor am I asking for a preference for Trinity, but I am saying let the operator look at his market. If he has got more Trinity viewers, then Trinity will get the channel. If he has got more Black Entertainment Television viewers, then BET will get the channel; ABC, NBC, whatever.

All I am asking is something that is simply one word, equity. And I am happy with that kind of language in the legislation. As long as an operator can meet his mandated must-carry provision by carrying a service, and if we are included in that group, then that is what I am after.

Mr. CROUCH. So we leave it up to cable to decide who goes into business and who goes out of business?

Mr. JOHNSON. We leave it up to the free marketplace.

Mr. CROUCH. That is all we are asking for, just let us have access to that marketplace. Do not chop us off from it.

Mr. JOHNSON. Well, you see, the problem there is that you want to be on it and then let the marketplace determine it. We are saying we will both come into the operator with a piece of paper and our promo tapes and say, here is what Black Entertainment Television provides; and you come in, and the operator makes the decision. No mandated position to say, let me test, because you cannot take candy from a baby, you cannot put it on and say, well, we do not like it, we are going to take it off.

What we are saying is no one starts out on the system. That decision is made by the marketplace. We will take that competition head-on any time. If we win, we win; if we lose, we lose.

Mr. CROUCH. But how do you decide unless you first have access to the audience and let them decide? If you are chopped off to begin with, how in heaven's name does that decision ever get to be made?

Mr. JOHNSON. It does not bother us.

Mr. CROUCH. It does me.

Mr. KOMPAS. Senator, to get back to the comments from the gentleman from the advertising association. Many of our stations are providing, for the first time, television advertising to merchants who have been economically barred from participating in this form of marketing. Our stations are selling television time at rates that are comparable to radio stations and thus, we are giving access for all kinds of new messages to be admitted.

In regards to the constitutional question that you have raised. I also am not a lawyer, so I do not know if I speak properly or not. But it seems to me that when LPTV was created, one of the reasons that it was created was to allow communities to be able to give emergency messages to their communities, in cases of storms, in cases of natural disasters.

And we have a situation where many of those kinds of stations are being silenced by cable systems, who do not have local programming, who do not deliver the emergency messages to those communities.

Also, we are being barred from those people who do not subscribe to cable. In many of the western States where we have citizens who are living outside of the immediate community, they are not even offered cable, much less being able to have the ability to buy it.

So, for them, the kinds of messages that we deliver are critical.

Mr. JAFFE. Senator, we do not have language at this moment, but we would be glad to have our constitutional experts and our other legal experts work with you and your staff. We have looked closely at the court cases and we do not believe that there are insuperable problems in developing a constitutional bill.

The court did not decide that it was unconstitutional to put must carry in place, it decided that the FCC had not done an adequate job of justifying its rules. And I think that justification is being developed to some extent by these hearings and any follow up materials that will be brought forward.

But I do not think that there is a legal bar to making the marketplace competitive. I think it would be a real disservice if we did not act in this area.

Senator INOUYE. Mr. Crouch.

Mr. CROUCH. Senator, I think one of the features in this bill must be at least a reasonable initial period of time for all of the local channels to be carried on a cable system. If after a year or two years they are not supported by their local communities or do not meet some kind of an audience measurement test, fine. We will take our lumps along with everybody else.

But my argument is strong that you have got to have some initial full access to your potential viewers in your marketplace so that they can decide. If you are immediately chopped off and never get access—we build new stations in new markets, and since the loss of must carry, when we sign a new station on the air, it is like pulling teeth to try to get on any of the cable systems.

And those stations struggle and struggle, and some of them are having to be subsidized by some of our other earlier, stronger stations to even keep them on the air.

Greensboro, North Carolina; Poughkeepsie, New York; some of these stations—you know, we are a nonprofit organization, we are religious and Christian oriented, and so our purpose is not to make a dollar, so we subsidize them and keep them on because we want to keep Christian television on the air.

But if I was running a commercial venture, there is a half a dozen of the stations that we have that I would dump immediately because we have lost our cable carriage and we have lost access to our community that we are required by the FCC to serve.

Mr. JOHNSON. Senator, just one point. As a minority businessperson, I am a little bit amazed at companies coming here asking for a set-aside. It is something that minorities usually ask for, a set-aside, an opportunity to prove we can compete.

Well, I am not asking for a set-aside, I am not asking for a preference. You know, I am not the guy saying, give me a chance. I will go out, head to head, against ABC, NBC or CBS, and I will take my chances in the free marketplace.

That is all that I am asking, and I think if we did that, I think you would find that this thing would bypass court scrutiny without a problem. But when you get into saying the ABC guy or the PTV guy should get a preference over the Black Entertainment Television speaker or the Trinity speaker or the low-power TV speaker, that is when you get into the problem of justification.

And so we are basically saying let us go into this thing without preferences, without set asides, because there is no rational reason that I can think of, legal or constitutional or even public policy orientation, why one speaker should be granted First Amendment rights over the other. And if there is, I would be willing to consider it, and you can make a case.

Mr. CROUCH. Can I give you one, Mr. Johnson?

You are a programming service. You have no regulation rules to meet from the FCC. We are a broadcaster. The FCC says you must ascertain your community's needs and problems if you are going to receive your five-year license renewal expectancy.

We have burdens on us, that you as a programmer do not have, that we must meet. How can I ascertain my community's needs and problems, propose constructive programming that that ascertainment calls for, when I am chopped off from 50 percent of my audience?

You do not have any of those burdens; I do. I may lose my license if I do not properly ascertain my community and broadcast programming services that meet the needs of my community.

It is apples and oranges, man. We are talking about two different things here.

Senator INOUYE. Well, I think the discussion this morning indicated that we have our work cut out for us, and I can assure you that we will take up the challenge, and we will make every attempt to come forth with something.

The record will be kept open for another three weeks during which time you are invited to submit any corrections or addendums or supplemental testimony, and we will do what we can.

In the meantime, we will be calling upon you with specific questions primarily on the constitutionality involved here and seek your advice and counsel.

Thank you very much for your participation this morning. On behalf of the committee I thank you.

[Whereupon, at 11:25 a.m., the subcommittee adjourned, subject to the call of the Chair.]

## ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

CABLEVISION,
*October 18, 1989.*

Hon. ALBERT GORE, Jr.,
*Russell Senate Office Building, Washington, DC.*

DEAR SENATOR GORE: In an article in the September 1989 issue of *MSO* magazine, you were said to have cited an alleged dispute between a Long Island cable system and a UHF television station as "a case which has gotten compeletely out of control." This passage quoted you as saying, "* * * this UHF station couldn't get on the cable because this particular cable operator also had a Long Island news program and didn't want the competition" and that the station ". . . had to agree—as tribute—to cancel its excellent local news programming before it was allowed onto cable." As this is a reference to Cablevision and WLIG, we feel compelled to advise you that these statements are not true.

Our decision not to include WLIG had nothing to do with its news operations. In fact, we offered to carry their news programs, but WLIG rejected our offer.

Cablevision operates six separate systems on Long Island. WLIG is carried on five of the six systems. The system that does not carry WLIG has a channel capacity of 36 channels and all channels were fully programmed before WLIG came into being. In order to carry WLIG, we would have to drop an existing service.

Our decision not to carry WLIG was made for a variety of reasons, among them that much of the programming WLIG offered was redundant to broadcast and cable channels which we already carried and we preceived very little demand for their service among our customers.

The five Cablevision systems that carry WLIG all have a capacity greater than 36 channels. The system that WLIG is not yet carried on is being rebuilt to 52 channels and WLIG will be carried on the expanded system.

We have acted responsibly and in accordance with our view of how to provide the best mix of programming to our subscribers. No "tribute" has been requested, offered or extracted. We would be glad to respond to any additional questions you may have, and trust you will no longer accuse us of being a party to a "shakedown."

Sincerely,

WILLIAM J. QUINN,
*Vice President, General Manager.*

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COMMUNITY BROADCASTERS ASSOCIATION,
*November 16, 1989.*

Senator DANIEL K. INOUYE,
*Chairman, Communications Subcommittee,*
*Dirksen Senate Office Building, Washington, DC.*

DEAR SENATOR INOUYE: I am grateful for the opportunity you provided to the Comunity Broadcasters Association to testify at the hearings on cable television carriage of broadcast signals held on October 25, 1989.

At the hearing, you announced that the record would be kept open until November 16, 1989, for the receipt of additional written testimony. In response to your invitation, I am enclosing letters from low power television stations indicating the serious problems these operators have experienced in trying to secure cable carriage:

(1) Rural Television Systems have been thwarted in its attempt to extend national public television service and to introduce local service to rural areas that are not served by any conventional PBS or locally originating station.

(2) Warner Cable demanded $500–600 per month to carry an LPTV station in Olean, New York, and then declined to extend carriage to Bradford, Pennsylvania, despite subscriber demand for the service.

(3) A cable system serving Rhode Island and neighboring Massachusetts communities has refused to carry a new LPTV station, even though it has 52-channel capacity.

(4) Cable systems in Montana encourage their customers to claim an exemption for local taxes used to support over-the-air TV service via translators, even though those subscribers may also have outdoor antennas. The cable systems successfully lobbied to defeat legislation designed to close this loophole and to preserve funding for over-the-air service.

(5) In Raleigh, North Carolina, an LPTV station continues to be bounced back and forth between cable officials and city officials and cannot get a firm decision on whether or not its signal will ever be carried on cable.

(6) A community station serving Wailuku, Maui, Hawaii was denied carriage on the local cable system despite the fact that this LPTV was the first television station in the community and that it was used frequently by Maui's Mayor Tavares as a direct outlet to the people.

(7) In Paducah, Kentucky, denial of access to the cable system has caused the demise of the only independent community station and the loss of ten jobs. In the meantime, the system, Comcast cable, allots two channels for the local full power NBC affiliate.

Thank you again for your time and concern.

Respectfully yours,

JOHN G. KOMPAS,
*President.*

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**WRITTEN TESTIMONY OF CHANNEL AMERICA LPTV HOLDINGS, INC.**

Senator Inouye and Members of the Communications Subcommittee, we greatly appreciate this opportunity to provide written testimony in this proceeding on behalf of Channel America LPTV Holdings, Inc. ("Channel America"), a leading publicly-traded company in the Low Power Television ("LPTV") industry. For the reasons discussed below, Channel America wholeheartedly supports and endorses proposed legislation which will afford must carry status to LPTV stations on local cable TV systems.

**I. Channel America's Unique Perspective as Network, Licensee, and Program Originator**

Channel America operates a broadcast television network, owns and operates numerous LPTV stations, and produces original, innovative programming for airing on its network. As such, it represents a rapidly growing hybrid entity in the telecommunications industry, and has a unique perspective on the constitutional validity -- and practical imperative -- of including LPTV stations in any cable "must carry" legislation that this Subcommittee proposes.

Channel America's programming network primarily serves the emerging LPTV industry, as well as cable television systems, full power broadcast stations, and the home satellite dish market. Its network operates 24 hours a day, seven days a week, and currently

encompasses 33 operating stations that reach approximately eight million homes throughout the continental United States. The network began commercial broadcasting for its premiere season in October 1988.

As an FCC licensee and permittee, Channel America is one of the largest owner/operators of major market LPTV stations. Since its inception in January 1987, Channel America has acquired, has acquired options to purchase, or has entered into contracts to manage 42 LPTV stations, 15 of which are licensed.

Channel America is also a creator and distributor of original television programming for its network. It presently produces five original programs and distributes an additional 22 first-run shows per week for airing on the network. Channel America's original programming emphasizes viewer participation, and it is a leading innovator in the field of viewer participation programming.

In the near future, Channel America will be introducing new programming formats of great importance to the general public, Congress, and the FCC because of their value to the communities in Channel America's LPTV coverage areas. As we will now briefly illustrate, these new formats exemplify how Channel America and LPTV together can provide unique and diverse broadcast services to the public that are not now available from other video and broadcast media.

Channel America's new "Club TV" format will allow highly-targeted viewers to participate in special interest clubs (e.g., —

travel, health, creativity) which go well beyond their television sets. Viewers will watch special interest programming, tailored to their local needs and interests. Such programming will instruct viewers on how to continue their special interest in their non-viewing lives, including interaction with others who share the same interest. The format emphasizes families, encouraging them to do things as a unit, but it also embraces single persons, providing the impetus for interaction with others with common interests. Also important, this participatory concept includes local small businesses, allowing them for the first time to really benefit from the television medium, which is usually reserved for major corporations with large advertising budgets.

A second new Channel America format is the "Small Business Network," which will provide existing and would-be local entrepreneurs with the first real forum to share ideas and to derive tangible benefits from same. Channel America will offer programming such as the "Small Business Workshop," which gives viewers insights into and workings and challenges of actual businesses, and "Dr. Biz," a call-in advice show and showcasing of opportunities for part-time and family weekend businesses. Even more important, this new format will foster the creation of Small Business Cooperatives in each locale, where local merchants and service providers can exchange services, develop networking of prospective leads within a community or community-to-community, and participate in cooperative events and promotions within the community, using te-

levision as a key marketing vehicle. This format will mark the first time that television actually serves the small business community, the heart and soul of every locale. Allowing small entrepreneurs to begin to compete on more equal footing with big business is a key objective for the 1990's which Channel America vigorously will promote.

## II. LPTV's First Amendment Carriage Rights

At the October 25, 1989 hearings, Senator Inouye expressed the Subcommittee's determination that some form of must carry legislation would be presented to the full Senate for its consideration this year. Channel America applauds that decision. However, we are also very aware of the Senator's caveat that any such legislation must pass "constitutional muster," referring to two decisions of the U.S. Court of Appeals for the District of Columbia Circuit which declared unconstitutional earlier FCC cable must carry rules -- Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc., 476 U.S. 1169 (1986), and Century Communications Corp. v. FCC, 835 F.2d 292 (D.C. 1987).

In this section, Channel America will briefly outline what it believes to be the essential flaws in previous First Amendment analyses of cable must carry rules, and will set forth cogent reasons why LPTV stations (and other broadcast media) should be held to have their own First Amendment rights to cable carriage, which

must be reconciled with the First Amendment rights of cable operators and programmers.

A. Court Decisions

The Quincy and Century cases held that the FCC's 1972 and 1986 cable must carry rules violated the First Amendment rights of cable programmers, cable operators, and the viewing public. Cable programmers were said to be denied access to cable channels already occupied by mandatorily-carried local stations, cable operators were held to have lost their editorial discretion to fill their channels as they see fit, and cable subscribers were inhibited in their viewing selections. The Court further held that the FCC had failed to demonstrate that the must carry rules were necessary to protect local broadcasting (a possible justification, if proven) and that the 1972 rules were "fatally overbroad" because they indiscriminately protected all local broadcasters irrespective of the number of must carry stations in the locale, the degree of program duplication, the channel capacity of a cable system, and the potential exclusion of non-broadcast cable programmers.

The FCC's 1986 "interim" must carry rules attempted to come to grips with each of these objections, but were nevertheless invalidated in the Century case for failure to clearly foster a substantial governmental interest or be brief enough in duration to qualify as only an incidental restriction on free speech. Because the FCC declined to make any further remedial efforts, all that now remains of these rules is Section 76.66 of the FCC's

Rules, concerning input selector ("A/B") switches and consumer education about them.

B. FCC's Section 307(b) Mandate and the First Amendment

Channel America believes that the Quincy and Century cases give inadequate consideration to the FCC's responsibilities under Section 307(b) of the Communications Act of 1934, as amended -- a Congressional mandate -- to "provide a fair, efficient, and equitable distribution of radio [and television] service" throughout the United States. In this connection, the Court mistakenly asserts in Quincy that the FCC has abjured all interest in the well-being of individual local broadcasters per se and is concerned only about local broadcasting or "localism" as an abstract concept. We respectfully submit that not only is this an inaccurate understanding of the FCC's public interest responsibilities, but that such a position, if held by the FCC, would clearly violate Section 307(b). Even though cable systems are not formally licensed by the FCC, they are still subject to the FCC's jurisdiction, United States v. Southwestern Cable Co., 392 U.S. 157 (1968), and, as such, the FCC has a primary responsibility to supervise the media interrelationships between cable and full-fledged broadcast licensees, including LPTV stations.

Channel America maintains that, paradoxically, the FCC's responsibilities vis-a-vis LPTV are actually enhanced by the fact that LPTV stations have "secondary" status in the broadcast universe. As secondary stations, LPTV outlets are not entitled to

cause interference to full power television stations and, if they do, the LPTV station must eliminate the interference in some fashion or else cease broadcasting. Similarly, the average radius of an LPTV broadcast signal is between 15 and 25 miles, while the average radius of a full power station is between 50 and 75 miles. However, these strictures and engineering realities were knowingly crafted by the FCC when it fully elaborated the concept of LPTV stations and established the Low Power Television Service in Report and Order, FCC 82-107, 51 RR 2d 476 (1982). In so "giving birth" to LPTV as an inexpensive television outlet/programming challenge for broadcast entrepreneurs, the FCC did not intend to abandon its offspring. Rather, it carved out for LPTV a full-fledged albeit "secondary" role, and envisioned that LPTV would supplement and complement full power television, just as cable television does.

Channel America urges that if LPTV is to fulfill the role that the FCC originally envisioned for it as an innovator and local station par excellence, cable carriage is absolutely vital. By refusing to admit that cable subscribers may not obtain adequate off-cable reception through an A/B switch and that cable carriage may therefore be necessary to sustain a station's viability, the Century Court ignores 40 years of history proving that improved reception of local television stations is one of cable's two raisons d'etre. In other words, given LPTV stations' low power and small coverage areas, the FCC's Section 307(b) responsibilities and designated role for LPTV cannot be fulfilled without cable's

assistance. This is the constitutional "substantial governmental interest" that warrants inclusion of LPTV in the FCC's cable must carry rules.

Put differently, in City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986), the Supreme Court held that the awarding of exclusive cable franchises may violate the First Amendment rights of other cable operators to serve the same area. Similarly, the refusal of a cable system to carry a local LPTV station that needs such carriage in order to obtain local audience violates that LPTV station's First Amendment right to be viewed over cable and thwarts the FCC's licensing plan under Section 307(b) to use LPTV stations to supplement and complement other local telecommunications media.

## III. Recommended LPTV Cable Must Carry Rules

Before offering specific suggestions for cable must carry legislation, Channel America wishes to comment on the treatment of LPTV in the FCC's previous must carry rules.

With the LPTV Service having been officially established by the FCC in 1982, and given the FCC's above-described concerns about the role and progress of this new service, it is surprising to note that LPTV stations were not included as must carry stations in the 1986 FCC must carry rules. However, Paragraphs 93 and 144 and footnotes 75 and 97 of the Report and Order in MM Docket No. 85-349, 1 FCC Rcd 864 (1986), make clear that the reason for LPTV's

exclusion was simply that the FCC was implementing an "Industry Agreement" of several of the major broadcast and cable trade associations, and that Agreement provided that only "primary, full power television stations" qualified for must carry status. No analytical explanation for the exclusion of LPTV stations was provided, but the anti-competitive flavor of this "Agreement" is obvious.

At the October 25, 1989 hearings, the Panel I witnesses were essentially the signatories of the 1986 "Industry Agreement" (above), and they appeared to be generally in favor of Congressional codification of the FCC's 1986 must carry rules; however, again, no reference was made to LPTV must carry rights. In Panel II, Mr. John Kompas, President of the Community Broadcasters Association ("CBA"), vigorously testified in behalf of LPTV cable carriage, and Senator Inouye specifically expressed concern about the importance of must carry status for LPTV stations and about Mr. Kompas' allegations that many cable system multiple owners ("MSO's") have blanket policies against LPTV carriage, regardless of channel capacity and the merit of the LPTV programming.

Although Channel America is in general agreement with Mr. Kompas' CBA testimony, we cannot endorse his erroneous assertion that "LPTV stations have never had any legal right to cable carriage." The FCC's 1972 cable must carry rules were adopted ten years before the LPTV Service was established. Nevertheless, as the FCC's definitions of television translator stations and LPTV

stations demonstrate (Section 74.701(a) and (f)), translator and LPTV stations are essentially identical in a regulatory sense, except that LPTV stations are permitted to originate as well as retransmit programming. This identity is significant because the 1972 cable rules specifically required carriage of all translator stations with 100 watts or higher power that were licensed to the community of the cable system. This important point must not be overlooked.

Indeed, to this day there are many LPTV stations that are still "officially" designated as translator stations in the FCC's records -- for example, Channel America's Station W68BI, Driver, Virginia, and Station W57AP, Falmouth, Maine. Since both of the "translator" stations in this illustration operate at 1000 watts, we would stoutly maintain that they are entitled to mandatory carriage on cable systems at Driver and Palmouth under the FCC's 1972 rules. Thus, Channel America urges that LPTV stations can and indeed should legitimately trace their cable must carry rights back to 1972, so that any carriage codification at this time should not be regarded as altogether "new".

Channel America notes that both S. 177 and S. 905 presently pending propose to add a new Section 640(a)(1) to the Communications Act that would essentially codify the FCC's 1986 cable must carry rules. (It is these rules which were "in effect on December 10, 1987".) Channel America respectfully objects to this language, despite its simplicity, because, as explained above, its adoption

would not provide any LPTV must carry relief. Such relief can come only by codifying the FCC rules which were in effect on any date between June 17, 1982 (when the LPTV rules became effective) and July 19, 1985 (the date that the Quincy case was decided), or by specifically including LPTV stations as "qualified" stations for cable must carry purposes.

In other words, having demonstrated above that LPTV stations are constitutionally entitled to cable must carry status under the First Amendment and philosophically entitled to such carriage under Section 307(b) of the Communications Act and the FCC's LPTV regulatory program, Channel America respectfully urges that the Communications Act of 1934 should be amended to codify the FCC's must carry rules that were in effect on July 18, 1985. Alternatively, the Communications Act should be amended to codify the FCC rules in effect on December 10, 1987. However, if this approach is taken, additional language should be added that includes LPTV stations as "qualified" stations for must carry purposes without regard to the audience viewing standards of Section 76.55 of the Rules for a period of three (3) years after they first become operational.

## IV. Conclusion

LPTV is an industry of entrepreneurs, which, like the domestic satellite industry, is in danger of being smothered by cable and broadcast industry giants. Channel America and the LPTV industry in general are committed to bringing new, innovative, and valuable

viewer participation and other local programming to their audiences, which is clearly in the paramount public interest.

All that LPTV asks from Congress and the FCC is that LPTV stations be permitted to compete on equal terms with full power broadcast stations on cable television systems. In the final analysis, what should count is not whether a television station has "primary" or "secondary" status in an FCC technical sense, but rather whether its programming well serves its community of license. LPTV stations such as those licensed to Channel America clearly meet that test.

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STATEMENT OF BRIAN G. HOLTON,
GENERAL MANAGER, KTSF(TV), SAN FRANCISCO,
CALIFORNIA, AND MICHAEL J. SHERMAN,
STATION MANAGER, KTSF(TV)

Mr. Chairman and Members of the Subcommittee:

Lincoln Broadcasting Company ("Lincoln" or "KTSF"), licensee of television broadcast station KTSF, San Francisco, California, thanks you for your invitation to testify at the hearing on cable carriage of local broadcast signals on October 25, 1989. Lincoln was unable to send a witness then due to the need to remain in San Francisco to oversee the stations' coverage of, and participation in, the relief effort after the recent earthquake. Lincoln is pleased to submit these written comments and information for the hearing record.

For more than a decade KTSF has been the primary source of news, information and entertainment for the nearly one million Asian Americans in Northern California. In this written testimony Lincoln describes the station and its programming; summarizes the station's carriage on cable systems and experience in the absence of carriage rules; and calls the attention of the Committee and Subcommittee to an aspect of legislation which is

vital to KTSF, to the many cable operators who carry its signal, and to the viewers who depend upon that carriage.

Lincoln applauds your leadership in taking a hard, objective look at the status of signal carriage, and at the need for legislation addressing it.

I. KTSF AND ITS PROGRAMMING.

KTSF is an independent, commercial, locally owned UHF station. Licensed to San Francisco, it has served the entire Bay Area on Channel 26 since 1976. KTSF offers a wide range of diverse programming -- including news, information, public affairs and entertainment -- in 12 foreign languages as well as English. (More detailed information about the station's programming is attached to this testimony.) KTSF is the only television station in the market that regularly provides programming in Chinese (Cantonese and Mandarin), Japanese, Korean, Tagalog (Filipino), Vietnamese and Hindi, as well as Italian, Greek, Farsi and others. Several of these are the primary languages of a substantial, and rapidly growing, part of the local audience.

KTSF produces many of its own programs, and also acquires material from other sources, including overseas networks. Ninety-eight percent (98%) of the station's prime time and prime

access, eighty-three percent (83%) of early fringe and seventy-seven percent (77%) of the weekend schedule is in languages other than English.

Each week KTSF addresses the issues and interests of particular segments of the local community. For example, every weeknight the station airs its own live, locally produced, half-hour newscast in Cantonese Chinese, "Chinese News at Nine." The audio portion of this program, the first and only one of its kind in the nation, is broadcast on a local radio station in Mandarin, the other major dialect spoken in the 350,000-strong Chinese community in the Bay Area.

KTSF also produces a Chinese-language weekly public affairs program, the Chinese Journal, as well as a series of monthly public affairs programs airing in Japanese, Korean, Tagalog, Vietnamese, Cambodian and Laotian. All of these programs air between 5:30 and 6:30 p.m. on Saturday afternoons. The station also produces two annual events - The Asian-American Tennis Championships and the Chinese New Year Parade - with much of the proceeds going to various community organizations.

This KTSF programming serves as an important bridge to the wider culture for many residents, and is of vital assistance in the assimilation process. Public service programs on issues such as voter registration, AIDS, immigration, and the environment

(broadcast in a variety of foreign languages) are examples of the diverse ways in which the station has helped public officials and local communities. Community leaders, elected and other local officials often appear on the station. Recently the station has distributed over 4000 copies of a Chinese-language brochure on earthquake preparedness. The translation, printing and distribution costs for the 21-page brochure were assumed by the ownership of the station. Plans are currently underway to translate the brochure in Korean, Vietnamese, Cambodian and Laotian.

In short, KTSF competes in the highly competitive Bay Area television market by providing unique community service programming directed to the needs and interests of otherwise underserved multiple segments of the local audience.

II. KTSF AND CABLE CARRIAGE.

KTSF is received by its multiple audiences in one of two ways--over the air, and over cable systems. Cable has historically been a critical means of program delivery in the Bay Area due to topography which results in poor off-air reception. Other factors include the wide spread of population beyond the city center, and the removal or restriction of television antennas.

The importance of cable to reception is shown by a study done for the station in 1986. It indicated that about a third of the local Chinese population, one of the largest of the Asian ethnic groups, subscribed to cable. For this group the two main reasons for subscribing, according to the survey, were for improved television reception, and to receive KTSF.[1]

The KTSF signal is carried on about 50 cable systems, in about 75 communities, in and beyond the Bay Area (including in Sacramento). This availability promotes the policy objectives of Congress, declared in Section 601 of the Cable Act, "to assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public".

At the same time, Lincoln understands and appreciates the competitive nature of the television market, the limitations on system capacity, and the need to stand or fall on the value of the signal and to work cooperatively with cable. Lincoln has long adhered to a policy of working closely with cable system personnel, and of making them aware of the unique benefits of KTSF carriage. Lincoln has also engaged in a variety of joint promotional and other cooperative activities with individual

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[1] Such non-English-speaking viewers would be among those least likely to comprehend the need for, and function of, an "input selector switch" or other device which might be necessary to make KTSF available if it were not carried on cable.

cable systems. For these reasons, and due to the unique value of its programming, KTSF has generally been carried by the vast majority of the many systems in the area, including voluntary carriage beyond the former "must carry" zones.

There are, however, a few notable exceptions to this generally positive experience. These exceptions suggest that Cable Act goals are being undermined in the present regulatory environment, and that signal carriage legislation is needed and timely.

After passage of the Cable Act and during the period of FCC revision and judicial invalidation of the must carry rules, the KTSF signal has been dropped completely or in part in four instances. Three were without notice to the station, viewers or the local franchising authority. In three of the cases the cable operator reconsidered, acceded to expressions of community preference and restored KTSF to carriage; a cooperative relationship between station and operator was restored. Features of each instance are instructive for the Committee's purposes:

1) KTSF was dropped by the TCI systems in Sunnyvale and San Mateo on December 23, 1986. At that time the Asian population was 16% in Sunnyvale and 8% in San Mateo. Other local stations were also dropped at the same time. All of the replacement programming was made-for-cable program services.

In this instance, in contrast to the Millbrae system (discussed below), TCI has been unresponsive to expressions of preference for KTSF from viewers and community organizations, and to requests from elected officials that the action be reconsidered. TCI cited a subscriber survey as justification for dropping KTSF, but has conceded that it was done only in English, effectively eliminating any response from the station's core audiences. The system promised to do another survey, this time multilingual, within six months, but that survey has yet to be done to Lincoln's knowledge.

2) United Cable, holding three franchises for four communities (Hayward, San Leandro, San Lorenzo, and Foster City), dropped the KTSF signal and substituted a combination of a home shopping service in which the operator had a direct financial interest (Cable Value Network, owned in part by United Cable TV and TCI, in turn one of the owners of United), and The Fashion Channel, also wholly owned by cable interests. No advance notice was provided. Subscribers and citizens' groups contacted the company and city officials of the franchising communities, some of which adopted resolutions asking the cable operator to reconsider its action in light of the public interest. As a result, the operator cooperated in working out the details of restoring the signal to part-time carriage immediately, and to

full carriage on a rolling basis as upgrading of the system is completed.

3) Without notice, Westar Communications, the operator of the system in Half Moon Bay, California, dropped KTSF and replaced it with a fourth PBS station on the system. Adverse community reaction led the operator to reconsider and restore KTSF.

4) Without warning in September, 1989, TCI began deleting KTSF programming during the hours of 4:00 p.m. and midnight each weekday, and noon and midnight on weekends, on its Millbrae, California system. These time periods comprised 80% of the station's foreign language schedule. Approximately 14% of the population in Millbrae is Asian; many are Taiwanese immigrants who depend upon KTSF for programming in their principal language, Chinese. In KTSF's place, the system substituted Pacific Sports Network, a start-up regional sports service and joint venture of TCI and Viacom.

After community protest expressed to TCI and the City Council, which was considering renewal of the franchise, and after Congressional expressions of concern and encouragement that the decision be reconsidered, TCI restored KTSF to full carriage. TCI Millbrae is to be commended for its cooperation and

responsiveness to expressions of community preference and concern.

In combination, these instances exhibit characteristics which legislation should address. Lack of notice to allow "damage control" of the disruption to viewers, the station and its advertisers is one such characteristic. Another is replacement of a local station with a made-for-cable service typically owned by the operator itself. Some of the actions also suggested decisions made as part of an overall scheme devised in the multiple system owner's headquarters office to be applied on a blanket basis regardless of circumstances, needs or interests in local communities. In the majority of instances, the replacement programming allowed the operator to sell commercial time locally in competition with the station whose signal was made unavailable to many viewers.

Replacing an independent station that provides needed community-responsive programming with a standardized service owned by the cable company is anti-competitive. It also suggests that Congressional intent to promote a diversity of programming on cable is threatened by (1) the proliferation of cable-owned programming channels which offer financial inducements for carriage that cannot be matched by local stations, and (2) the increasing concentration of cable system ownership in fewer major corporate hands.

KTSF has had to divert considerable resources to countering the situations described above. Fortunately, in these efforts KTSF was not alone. The multiple communities deprived of the programming rallied support. Mayors and Councils of some of the affected cities passed resolutions recognizing the contributions of KTSF programming to the community. Representatives such as Congressman Lantos, Congressman Stark and Senator Wilson deserve appreciation from their constituents for expressing their concerns effectively. These actions, and the cooperation of the cable operators with the station and the communities, helped achieve restoration of carriage of the station's programming.

Nonetheless, we prefer to put our time, energy and resources into serving the public, not into campaigns to make viewer preferences known to cable operators. Of greater importance to your hearing, conditions in the marketplace identified in this letter are undermining the intent of the Cable Act.

The implications for your hearings are that things have changed since 1984 when the Cable Act was passed. In the new environment, Congress must pursue its codified concerns for a diversity of programming on cable and for responsiveness to local communities. Local preferences, even when clearly and strongly expressed, must compete increasingly with powerful profit factors tied to the business ventures of cable operators themselves, who

are concentrated in a shrinking group of major corporations. This, it is suggested, is not at all the kind of competitive environment that Congress set out to foster in 1984.

To promote diversity and fair competition, part of Congress' response to the current market imbalance should be to promote First Amendment values by protecting viewers' rights to receive local stations on publicly franchised cable systems. This would also go a long way to remedy the increasing incidence of vertical integration of channels and program services, and concentration of ownership of cable systems, which contribute to the kinds of anti-competitive, anti-community actions described here.

III. LEGISLATION.

Lincoln supports enactment of legislation requiring the carriage of local signals, but must highlight a critical concern with some of the proposals that have been introduced (specifically, S.177 and S.905) and discussed. Due to an anomaly in the way the 1987 FCC must carry rules applied to KTSF's unique circumstances, KTSF became a local San Francisco station which, by operation of the rules, became ineligible for mandatory carriage as a "local" signal as to any of the fifty systems carrying it.

This was because one of the criteria for eligibility for must carry status was that a showing of minimum viewing be made only in accordance with standard Arbitron and Nielsen audience rating methodology. That methodology does not take into account or compensate for the multiple foreign languages spoken by the majority of KTSF viewers. Adapting this nearly unique circumstance to the standard methodology would have required multiple, specially designed and implemented audience surveys in several languages. If that could have been accomplished at all, the cost would have been as much as $1,000,000.00.

On many Bay Area systems, more stations could show eligibility than had to be carried. In this circumstance, operators could select from a pool of "eligible" stations, carrying some and not others. KTSF faced the prospect of having to compete with other stations in the market for carriage only on a second class citizen basis. Stations which did not face the multiple foreign language obstacle, and which met other eligibility criteria (as did KTSF), could request carriage as "eligible" under the rules. KTSF could not do so, for reasons unrelated to the actual size of its audience but due to the required audience measurement methodology. The many cable systems wanting to continue to carry KTSF could have done so only as an additional signal above the maximum number of channels which the rules required to be dedicated to must carry.

Before the rules took effect Lincoln sought and obtained FCC relief. The Commission granted KTSF a temporary exemption from the viewing standard to allow the Commission to consider the merits of a permanent exemption; the public notice of this action is attached. This relief was supported at the FCC by several cable systems, including Viacom Cablevision, Gill Cable (now Heritage), Donney Cable, Cable Oakland and United Cable, whose letter to the FCC is attached as an example. All sought the flexibility to carry KTSF and count it toward compliance with the rules. (Because of the demise of the rules themselves after they were held to be unconstitutional, the FCC did not resolve the question of a permanent waiver.)

If signal carriage legislation merely revives the 1987 FCC rules verbatim, this anomaly and inequity could be recreated. This result can and should be avoided in new legislation. There are several ways in which this could be done:

1) Eligibility could be determined based upon other factors and without regard to viewing standard showings. That approach is taken, for example, in S.1880, the bill introduced by Senator Danforth and fourteen other Senators.

2) Legislation could provide that stations which would be required to conduct multiple, specially commissioned foreign language surveys in order to make the "standard" showing, are

exempt from the viewing standard (though they must meet the other criteria).

3) Legislation could "grandfather" the relief afforded earlier by the FCC.

4) Alternative methods of making the showing could be allowed in narrowly defined circumstances.

5) The FCC could be expressly empowered, and required to grant liberally consistent with the intent of the Cable Act, waivers of the viewing standard in specific circumstances to prevent unfairness and the elevation of form over substance.

KTSF does not urge that distinctions be made in the legislation based on preference for one type of programming over another. Lincoln does advocate, however, that a narrowly tailored solution be included based upon the unworkability of the standard audience measurement methodology in its particular circumstances.

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We look forward to working with you on these important issues, and would be pleased to assist further in your efforts.

**STATEMENT OF JOHN L. HANKS**
**DIRECTOR OF THE BUREAU OF FRANCHISES**
**FOR THE CITY OF NEW YORK**
**TO THE UNITED STATES SENATE**
**COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION**
**SUBCOMMITTEE ON COMMUNICATIONS**

October 25, 1989

Mr. Chairman, Members of the Subcommittee, on behalf of the City of New York ("City"), I thank you for the opportunity to submit a statement for the record as part of your hearing on the carriage of local broadcast stations by cable television systems.

The City has been and continues to be a leader and innovator in the communications and entertainment marketplace. In 1970, the City granted two cable television franchises to cover Manhattan, which set the municipal regulatory standard for over a decade. In 1983, the City again established the national standard for reasonable regulation of cable television when it granted franchises to cover The Bronx, Brooklyn, Queens and Staten Island.

But the City's ability to ensure that its residents receive high quality cable services in the public interest has been severely constricted by unanticipated post-Cable Act developments. One of the most important developments has been the judicial elimination of the Federal Communications Commission's

must-carry rules. This development is of special concern to the City since the Cable Act limits the ability of cities to require that cable operators carry programming of interest to their local constituents and because the City is the licensee of WNYC-TV ("WNYC") -- a public television station that is an important source of programming to the residents of the City.

I. NATURE OF THE THREAT TO LOCAL BROADCASTING

We are concerned that, as a result of the elimination of the must-carry rules, cable operators may drop carriage of local broadcast signals or reposition them to undesirable channel positions. Increasing vertical integration in the cable industry heightens our concerns since it is possible that cable companies will eliminate or discriminate against broadcasters in favor of their affiliated programming.

Cable operators' potential to exclude broadcasters from many cable homes threatens the continued economic survival of local broadcasting. If the viewership for a broadcast station declines as a result of actions by cable operators, broadcast stations may find that they can no longer afford to produce local programs, and indeed, may no longer be able to operate. The loss of over-the-air television would be unfortunate, since many of the City's lower income residents, who cannot afford the ever-increasing costs

of cable, will no longer have access to the same diversity of programming. We fear that the gap between the rich and the poor in our city may be exacerbated by the elimination of our independent broadcast stations.

The loss of broadcast programming would also be detrimental to cable subscribers, since the local programming provided by broadcasters is not duplicated by cable operators or national program services.

The City, through its franchise agreement, has attempted to encourage cable operators to provide local programming; however, we would not welcome such a result, if cable operators could exclude other sources of local news, information and entertainment. It is important for the City's residents to have access to a diversity of sources of information so that they can make informed and intelligent decisions. Cable operators cannot be allowed to block the public's access to news and other programming which differs with the views and positions on programming affiliated with cable operators.

We are especially concerned about the public's access to information provided by noncommercial public television stations and municipally-owned broadcast stations. These stations are particularly susceptible to elimination by cable operators since, unlike commercial network affiliates, they do not provide the

popular nationally-oriented programming that affiliates carry. Yet, these stations provide an invaluable public service.

The City's municipally-owned station, WNYC, for example, provides numerous local programs of interest to the people in the New York City metropolitan area, such as "News from City Hall", "Debating the Charter" and "Drugs in Queens: A Community Fights Back." However, since elimination of the must-carry rules, many cable systems have either dropped or denied carriage to the station or reduced its programming time.

Of the 69 New York and New Jersey cable systems in WNYC's Grade B contour, 18 systems do not carry WNYC and 17 other systems only carry WNYC part-time. These 69 cable systems have more than 1.7 million subscribers. If they all decided to eliminate WNYC from their systems, the impact would devastate the station and would result in the loss of a diversity of local cultural and educational programming for cable subscribers.

Even if cable systems do not eliminate WNYC, cable operators can still harm the economic vitality of the station by repositioning it to an undesirable channel location. WNYC has expressed its concern that the two Manhattan cable systems, which are currently negotiating renewal contracts with the City, might move

the station to a new channel position. Currently, WNYC is located on cable channel three on both systems. This channel position has given the station high visibility, which has resulted in a significant increase in membership revenue. If the station is repositioned, the station will likely suffer a reduction in viewers and contributors.

## II. RECOMMENDATIONS TO PROTECT CONSUMERS' INTEREST IN A DIVERSITY OF LOCAL PROGRAMMING

As you can see, elimination of the must-carry rules is a concern not only of broadcasters. Consumers are also concerned, since they have traditionally depended on local broadcast stations to keep them abreast of the latest local developments.

The City urges Congress to take action to protect the consumers' interest in a diversity of local broadcast programming, especially the interest of low income consumers who cannot afford cable or who can afford only the basic tier of cable service. In order to protect consumers' interest, we recommend that Congress enact pending legislation tying a cable operator's right to enjoy the benefits of compulsory licensing to the carriage of local television broadcast stations on the tier of cable service regularly provided to all subscribers at the minimum charge.

In order to resolve the dispute between the broadcast and cable industries over channel positioning, we support Subcommittee Chairman Daniel K. Inouye's suggestion that Congress "freeze" the channel position of local broadcast stations on cable systems until the Federal Communications Commission has had a chance to study the issue and make recommendations to Congress. We suggest that Congress tie any such "freeze" to compulsory licensing so that a cable operator has an incentive to abide by the "freeze." Otherwise, a cable operator might simply eliminate, rather than carry, a station at the "freeze" channel position.

If Congress enacts legislation addressing the channel positioning issue, we suggest that Congress include a provision granting franchising authorities the right to resolve channel positioning disputes pursuant to appropriate congressional guidance. Finally, so that cable consumers are not confused by a constant reshifting of programming, Congress should grant a local franchising authority the right to approve retiering decisions by local cable operators, regardless of whether the operators are subject to rate regulation.

* * *

The Cable Act limited the power of franchising authorities to protect the interest of consumers in local programming. Elimination of the must-carry rules further threatens the public interest in such programming. In order to enhance the public's access to vital local news and information, the Congress must pass appropriate legislation.

**STATEMENT OF**
**THE NATIONAL LEAGUE OF CITIES AND**
**THE UNITED STATES CONFERENCE OF MAYORS**
**TO THE UNITED STATES SENATE**
**COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION**
**SUBCOMMITTEE ON COMMUNICATIONS**

**October 25, 1989**

The National League of Cities ("League") and the United States Conference of Mayors ("Conference") submit the following statement concerning the carriage of local broadcast stations by cable television systems. The League represents more than 16,000 cities and towns across the nation, and the Conference represents more than 800 cities in this country with populations exceeding 30,000 residents.

I.

The judicial decisions invalidating the FCC's "must-carry" rules have upset a 20-year regulatory scheme that was an integral part of the foundation of the Cable Act. As a result of these decisions, cable operators already have dropped a number of local television stations, particularly public broadcasting stations and UHF stations. Increasing vertical integration makes it even more likely that cable operators will continue to drop popular broadcast programming that competes with affiliated cable programming. The result will be a net loss in important program diversity for the American public.

Concerns raised by judicial invalidation of the must-carry rules are compounded by the FCC's elimination of rate regulatory authority and the Cable Act provisions regarding retiering. Cable operators maintain that they may, without franchising authority approval, realign their service offerings and corresponding rates pursuant to Section 625(d) of the Cable Act if they are not subject to rate regulation under Section 623 of the Cable Act. As a result, cable operators place broadcast stations on service tiers which are generally not made available to all subscribers, and franchising authorities are powerless to take any corrective action.

Cable's potential to exclude local broadcasters threatens the economic survival of these broadcasters, which are increasingly dependent on cable to provide them access to many consumers' homes. If broadcast stations go dark, consumers (especially poor consumers who cannot afford cable) would no longer have access to this traditional free source of important local news, information and entertainment.

The League and Conference are especially concerned about the future of noncommercial public television stations and municipally-owned stations. These stations, which provide an invaluable public service on which many Americans depend, are often the first to be displaced by cable operators. Many public television stations and other programmers have already suffered as a result of the elimination of must-carry rules. The FCC conducted a survey in which 869 cable operators admitted dropping or denying carriage to 704 television stations.[1] Since some of these stations were dropped or denied carriage by more than one cable operator, the number of drops or denials totalled 1,820. The study also showed that several stations are now required to pay for continued carriage on cable systems.[2]

II.

Congress should act now in order to prevent further actions by cable operators which threaten the access of the public to free local television broadcast programming. The Conference and the League have adopted cable television resolutions which, among other things, recommend legislation mandating that, as a term and condition of availing themselves of the benefits of compulsory licensing under the Copyright Act, cable operators carry local television broadcast signals. The Conference and League are pleased to see that several Members of Congress, including Members of this Subcommittee, have introduced legislation reflecting this recommendation. We urge Congress to pass those measures.

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[1] Mass Media Bureau, Federal Communications Commission, Cable System Broadcast Signal Carriage Survey Report (September 1, 1988) at 10.

[2] Id. at 24.

In order to resolve the dispute between the broadcast and cable industries over channel positioning, the League and Conference support Senator Inouye's suggestion that Congress "freeze" the channel position of local broadcast stations on cable systems until the Federal Communications Commission has a chance to study the issue and make recommendations to Congress. The League and Conference recommend that Congress tie such a "freeze" to a cable operator's right to enjoy the benefits of compulsory licensing. Otherwise, if the broadcast station is at a channel position the cable operator desires for other programming, the "freeze" may provide an incentive for a cable operator to simply drop a local broadcast station.

The League and Conference also suggest that Congress ensure that low income cable subscribers have access to local broadcast programming by requiring cable operators to carry such signals on the entry-level, lowest-cost service tier of cable service. Further, in any channel positioning legislation that the Congress might adopt, the League and Conference recommend that Congress include a provision granting franchising authorities the right to resolve disputes over channel positioning of broadcast stations pursuant to appropriate congressional guidance. Finally, so that cable consumers are not confused by a constant reshifting of programming, Congress should eliminate the provisions of Section 625(d) of the Cable Act, which prohibits cities from regulating the rearrangement of service tiers if such tiers are not subject to rate regulation. In place of that provision, Congress should add affirmative language stating that local franchising authorities have the right to approve retiering decisions by cable operators, regardless of whether the tiers are subject to rate regulation.

Although must-carry and other programming requirements will not solve all of the franchising problems created by the post-Cable Act developments, such requirements will help to ensure that consumers continue to have access to important local and public television programming.

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